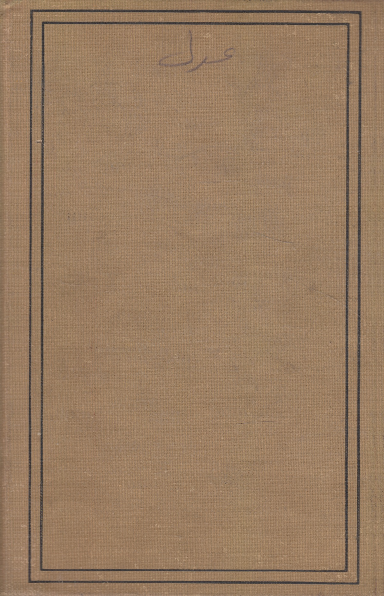








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

MAY 7, 1945 (PART) TO NOVEMBER 30, 1945

WITH

REPORT OF

DECISIONS OF THE SUPREME COURT

IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

VOLUME CIV

UNITED STATES

GOVERNMENT PRINTING OFFICE

WASHINGTON : 1946

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C. Price $2.50 (Buckram)



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J. WARREN MADDEN [2]

Judges Retired

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Acting Chief Clerk

WALTER H. MOLING

---

*Deceased October 24, 1945.

[1] From January 15, 1943, to July 1, 1945, Judge Jones took no part in the consideration of cases, being on leave; serving from January 15, 1943, to June 29, 1943, as adviser and assistant to the Director of Economic Stabilization; as president, United Nations Conference on Food and Agriculture, Hot Springs, Va., May 18 to June 3, 1943; and from June 29, 1943, to July 1, 1945, as War Food Administrator, by appointment of the President.

[2] At the request of the War Department Judge Madden was on June 25, 1945, granted leave of absence for one year for service as Deputy Director, Legal Division, U. S. Element, Control Council for Germany.

[3] On military leave, November 2, 1942, to November 1, 1945; lieutenant commander, U. S. Naval Reserve, on active duty.

[4] On leave, September 22, 1943, to October 1, 1945, with War Food Administration.

[5] Temporary Commissioner December 7, 1943, to November 1, 1945, vice W. Ney Evans, on military leave. Appointed Commissioner, November 1, 1945, to succeed Neal L. Thompson, deceased.

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Assistant Attorneys General
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[6] On military leave, October 20, 1942, to January 2, 1946; lieutenant colonel, U. S. Army, on active duty.

[7] Designated to assist Mr. Justice Jackson in the trial of Axis War Criminals. Resigned September 28, 1945.

[8] Designated Acting Head, Claims Division, May 15, 1945, to August 18, 1945.

[9] Designated acting Head, Claims Division, effective August 18, 1945. Appointed Assistant Attorney General, October 23, 1945.

[10] Designated Acting Head, Lands Division, effective November 30, 1944.

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LEGISLATION RELATING TO THE COURT OF CLAIMS

[PRIVATE LAW 276—79TH CONGRESS]
[CHAPTER 520—1ST SESSION]
[H. R. 977]

AN ACT

For the relief of John August Johnson.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims of the United States be, and it is hereby, given jurisdiction to hear and determine the claim of John August Johnson, of Rockford, Illinois, and to render judgment against the United States in his favor for such compensation and damage as may be found to be justly due, if any, as compensation and damage sustained by reason of the destruction by fire on October 4, 1923, of the dwelling house located on the farm lands of John August Johnson, situated near Camp Grant, Illinois, while said farm lands were occupied by the War Department.

SEC. 2. Said claim shall not be considered as barred because of any existing statute of limitations with respect to suits against the United States: *Provided,* That suit is brought within one year of the approval of this Act.

Approved December 3, 1945.

679645—46—vol. 104——2



CASES DECIDED

IN

THE COURT OF CLAIMS

May 7, 1945 (part) to November 30, 1945, and other cases not heretofore published

LEO SANDERS v. THE UNITED STATES

[No. 45469. Decided May 7, 1945]

On the Proofs

Government contract; labor from relief rolls; delay by defendant in referring relief labor; breach of contract.—Where contract for construction of Government housing project, in 1936, provided (article 20) that contractor should employ workmen referred for assignment to the contract by the United States Employment Service, preference to be given to persons from the public relief rolls, and that when organized labor, skilled or unskilled, was wanted by contractor requisition should be made by him therefor upon the labor organizations, preference also being given to organized labor on the public relief rolls; and where the contractor requisitioned all labor from the employment service and it is shown by the evidence that plaintiff was seriously delayed in the completion of the contract for want of an adequate number of skilled workmen and that the defendant delayed unreasonably in obtaining information as to workmen available locally for referral to the job from relief and unemployed rolls, and in making referrals on contractor's requisitions; it is *held* that such delay constituted a breach of the contract and plaintiff is entitled to recover.

Same; agreement upon new contract period under change order.—Where, in the instant case, in the change order given April 10, 1937, and formally issued August 30, 1937, the parties agreed upon a new contract period for completion; applicable to all work under the contract and not merely to additional work; the change order, calling for additional work and allowing 60 days additional time, can not on the evidence be regarded in whole or in part as merely an extension of time by

the defendant on account of delay in connection with the original contract work, which would not operate to relieve the Government of liability for damages for breach of its contract by causing a delay for which such an extension is granted. Cf. *Seeds & Derham* v. *United States*, 92 C. Cls. 97.

Same.—Where the change order was made under and fulfilled the requirements of the equitable adjustment provisions of the contract; and where the change order was without restriction or qualification and the additional time provided for applied to the completion of the original as well as to the additional work specified therein, both parties became entitled to the full benefit of the new contract period and either could point to it in defense of a claim by the other for damages for delay. *Blair* v. *United States*, 321 U. S. 730, 734, cited.

Same; unauthorized conditions imposed by defendant on referrals from relief rolls.—Where, except for the requirement of article 20 of the contract and the unauthorized conditions imposed by the defendant on referrals during a strike of union workmen, plaintiff could have, on and after January 3, 1937, obtained and employed an adequate number of workmen to carry on the work; and where after the defendant, on March 26, 1937, released plaintiff from the requirements of article 20, plaintiff did obtain an adequate number of workmen; it is *held* that defendant delayed unreasonably in taking this action.

Same; intention of Wagner-Peyser Act.—Neither the Wagner-Peyser Act (48 Stat. 113) nor article 20 of the instant contract was intended, under such circumstances as are shown to have existed in the instant case, to hamper a contractor in employing on a work relief project workers who were unemployed and who were willing to work on the project if employed directly by the contractor.

The Reporter's statement of the case:

Mr. James E. Grigsby and *Mr. Thomas P. Gore* for plaintiff.

Mr. James E. Grigsby was on the brief.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff seeks to recover $40,720.79, excess costs and equipment rental alleged to have accrued as a result of 133 days' delay claimed to have been caused by defendant in failing to furnish, with reasonable promptness, an adequate number of skilled workmen and in refusing to release plaintiff from the labor requirements of the contract so that he might employ such workmen direct.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. July 9, 1936, plaintiff, a resident and citizen of Oklahoma City, Okla., entered into a contract with defendant, acting by and through the Federal Housing Division of the Federal Emergency Administrator of Public Works, for the construction of a superstructure for the Rotary Park Housing Project, No. H-8108, in Oklahoma City, Oklahoma (which project was later referred to as "The Will Rogers Memorial Housing Project"), in consideration of the sum of $1,559,965.

Work under the contract was to be commenced upon receipt of notice to proceed and be completed within 270 calendar days from such notice. Plaintiff received notice to proceed July 29, 1936, thus fixing April 27, 1937, as the time for completion. By a change order the time for completion was extended to June 23, 1937. Plaintiff completed his contract September 4, 1937.

The project consisted of the building of one- and two-story houses or buildings on concrete foundations which had been constructed by plaintiff under a prior contract. This foundation contract had been completed on time before notice to proceed on the superstructure contract in suit had been received by plaintiff. There were about 86 separate buildings of various sizes involved, some to accommodate 4 or 5 families, while others were to accommodate 8 or 10 families, the area covering 30 or 40 acres. The work of constructing these buildings required the employment of a large force of skilled workmen and common labor.

2. The contract was signed for the Secretary of the Interior, as Federal Emergency Administrator of Public Works, by Horatio B. Hackett, assistant administrator. Under the terms of the contract H. A. Gray, Director of the Housing Division of the Administration of Public Works, was the contracting officer, and Hackett was duly authorized to act for and did act as the head of the department under the contract in connection with all matters with reference thereto. Subsequently, by Executive Order No. 7732 of October 27, 1937, the U. S. Housing Authority, of which Nathan Straus became the administrator, took jurisdiction and authority

from the Administrator of Public Works over plaintiff's contract and similar projects. Plaintiff had completed all work called for by his contract on September 4, 1937, but final decision and settlement of certain matters thereunder were not concluded until after October 27, 1937.

3. Art. 9 provided for liquidated damages for delayed completion but plaintiff was not to be charged thereunder for any delay in completion due to unforeseeable causes beyond his contract and without his fault or negligence, including, among other things, acts of the Government. The work was completed 73 days beyond the contract period as extended 60 days, but no liquidated damages were charged for the reason hereinafter set forth.

Art. 15 provided that "All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the head of the department." This article further provided that all other disputes concerning questions arising under the contract should be decided by the contracting officer or his authorized representative, subject to appeal to the head of the department or his authorized representative "whose decision shall be final and conclusive upon the parties."

4. Arts. 20 and 24 (a) of the contract are important to the question presented, and are as follows:

> ART. 20. (a) *Employment Service.*—With respect to all persons employed under this contract, except as otherwise provided in Regulation No. 2, issued by Executive Order No. 7060, dated June 5, 1935, (i) such person shall be referred for assignment to such work by the United States Employment Service, (ii) preference in employment shall be given to persons from the public relief rolls; provided that persons not on public relief rolls may be employed on this project where qualified persons cannot be obtained from the public relief rolls and provided further, that supervisory, administrative, and highly skilled workers on the project, as defined in the specification, need not be so referred by the United States Employment Service, provided that when organized labor, skilled or unskilled, is desired by any contractor employed to handle all or any part of this project, the contractor shall requisition such workers as

may be required from the representative of each recognized union concerned; the representative of the union will select union members for work on the project giving preference, first, to those members of the union who are on the local public relief rolls; second, upon exhaustion of union members on such rolls, to any other members of the union; actual assignment of these workers to projects thereafter will be the responsibility of the Works Progress Administration.

(b) Except as specifically otherwise provided in this Contract, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any ground whatsoever.

(c) The Contractor shall have the right, subject to disapproval by the Contracting Officer, to dismiss any employee.

(d) Only one member of a family group may be employed on work under this contract, except as specifically authorized by the Works Progress Administration.

ART. 24. (a) No person under the age of 16 years, and no one whose age or physical condition is such as to make his employment dangerous to his health, or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

Under art. 24 (a) of the contract, plaintiff required a preemployment physical examination or a doctor's certificate as to the physical condition of all workmen to be employed on the project.

5. After receipt of notice to proceed, plaintiff's and defendant's engineers prepared a monthly progress schedule showing the time expected to be used for each of the various operations in carrying on the work and the time of its completion. This schedule was approved by defendant as reasonable.

6. Immediately prior to commencing operations under the contract in suit on July 29, 1936, plaintiff had performed and completed another contract with defendant for the concrete foundations for the same project. The foundation contract contained arts. 20 and 24 above quoted, and under that con-

tract plaintiff adopted and pursued the practice under art. 24 (a) of requiring of all workmen employed on the project, a preemployment certificate from their own physician, or from a physician provided by plaintiff, that their physical condition was such as not to make their employment on the project dangerous to their health or safety, or to the health or safety of others engaged on the work.

7. In performance of the foundation contract plaintiff employed union and non-union workmen in skilled and semi-skilled trades. All union workmen were, under art. 20, requisitioned and obtained by plaintiff from the union, and all non-union workmen and all common labor were requisitioned and obtained, under art. 20, from the Employment Service specified by that article. Toward the end of the work on the foundation contract, a controversy developed between plaintiff and the union as to whether union workmen had to furnish a doctor's certificate or submit to a physical examination prior to being employed. Upon plaintiff's insistence that such physical examination would be required under the contract most of the union men left the work, and the union thereafter demanded that plaintiff should not only abandon the requirements of physical examination, but should restrict all skilled jobs to union men. No strike was declared by the union under the foundation contract. The controversy continued after commencement of work under the superstructure contract. The union workmen who had quit work on the prior contract did not return to work under the next contract, and the union declined plaintiff's requests for skilled workmen under the superstructure contract. A representative of the contracting officer and the head of the department went to Oklahoma and endeavored to adjust and settle the controversy without success; however, the controversy was narrowed to the matter of the preemployment physical examination. Plaintiff held out for it and the union held out against such requirement.

8. Plaintiff entered upon the work of performing the superstructure contract upon completion of the foundations with substantially the same force which had been employed under the prior contract. During most of August 1936 plain-

tiff was engaged principally in organizing the work under the building contract and in assembling the necessary materials therefor, and did not make requisitions for skilled workers but continued to use a number of skilled workmen who had been employed on the foundation contract and who continued with him on the instant contract.

9. The U. S. Employment Service designated the Oklahoma State Employment Service (hereinafter referred to as the SES) as the agency to act for it in referring workmen on plaintiff's requisitions for assignments to the work under plaintiff's contract. The SES was affiliated with the U. S. Employment Service and was subject to its rules and regulations.

Plaintiff regularly throughout his entire operations under both contracts with defendant requisitioned all common labor from SES and at no time had any complaint to make as to quantity, quality, or efficiency of the common labor referred. Plaintiff was advised under both contracts that the Employment Service would not supply or refer union labor, and that, in accordance with the terms of the contracts, any union labor must be secured directly from the unions.

Plaintiff made a request of the union for certain skilled workmen on the superstructure project, but the unions refused to supply such labor because of plaintiff's insistence upon the preemployment physical examinations. Therefore, on August 28, 1936, plaintiff began and continued until March 26, 1937 to make and deliver to the SES requisitions for such skilled nonunion mechanics as were needed on the job. Such labor, although available and immediately obtainable, was not referred or supplied by the SES with reasonable promptness, and the contracting officer and the head of the department delayed unreasonably in releasing plaintiff from the contract requirement that he obtain all such labor through requisitions to and referrals by the SES. The SES office was unreasonably slow and in many respects was inexperienced and inefficient.

10. The first requisitions for skilled labor to the SES were received by it August 31, 1936, being nos. 1073, 1098, 1099,

1100, and 1101. These requisitions called for 50 carpenters whose appearance was requested in groups of 10 each on September 1, 3, 5, 8, and 10, 1936. In addition to the 50 carpenters requisitioned, plaintiff asked for 4 bricklayers and 2 cement finishers.

Upon receipt of the requisitions SES immediately asked Works Progress Administration for a list of available carpenters, brickmasons, and cement finishers who were on relief in Oklahoma County. There were 27 employment-service offices in the State of Oklahoma from which labor was to be obtained for referral to plaintiff's work, if sufficient labor was not obtainable locally by the Oklahoma City employment office. On receipt of such a list it was checked by SES to determine whether or not the men were competent and qualified. September 2, 1936, SES sent letters to 73 carpenters, 6 brickmasons and 4 cement finishers to present themselves to plaintiff for interviews for employment at plaintiff's project. This referral was from what is termed the "mass list." Comparatively few men from the mass list reported to plaintiff for employment.

11. The SES in response to plaintiff's formal requisitions for workmen began referring to plaintiff's project various skilled workmen. Typical referrals are as follows:

REFERRALS AS TO CARPENTERS

Requisition number	Date	Number of carpenters	To report—	Referrals dated
	1936		*1936*	*1936*
1073	Aug. 28	10	Sept. 3	Sept. 10, 12, 14.
1098	Aug. 28	10	Sept. 1	Sept. 4, 5.
1099	Aug. 28	10	Sept. 5	Sept. 9.
1100	Aug. 28	10	Sept. 8	Sept. 9, 10; Oct. 2, 31; Nov. 5, 7, 9.
1101	Aug. 28	10	Sept. 10	Sept. 15, 17, 19, 22; Oct. 30.
1242	Sept. 7	10	Sept. 9	Sept. 23, 24, 30.
1308	Oct. 2	20	Oct. 5	Oct. 3, 5, 7, 10, 15, 19, 20, 29, 30, 31; Nov. 4, 10.
1559	Nov. 10	20	Nov. 12	Nov. 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 30; Dec. 1, 10, 30; Jan. 4, 1937.
	1937			*1937*
2078	Mar. 24	25	Immediately	Mar. 26, 29, 31; Apr. 1, 3, 5, 6, 12, 13, 14, 15, 17, 19, 20, 21.

REFERRALS AS TO BRICKLAYERS

Requisition number	Date	Number of bricklayers	To report—	Referrals and men referred
	1936		*1936*	*1936*
1098	Aug. 28	4	Sept. 1	Sept. 4, 5.
1185	Sept. 14	25	Oct. 1	Oct. 14th, 2 men; 19th, 6; 20th, 1; 21st 1; 22nd, 3; 24th, 1; 26th, 2; Nov. 5, 1; 9th, 1; 10th, 1; 14th, 1; 16th, 2; 17th, 2; 18th, 1.
1219	Sept. 18	25	Sept. 24	Sept. 22, 4 men; 23rd, 6; 24th, 1; 26th, 1; Oct. 1, 2; 8th, 3; 9th, 6; 13th, 3.
1559	Nov. 10	20	Nov. 12	Nov. 12th, 1 man; 18th, 2; 23rd, 1; 27th, 1; 30th, 3; Dec. 2, 1; 3rd, 2; 4th, 1; 7th, 2; 10th, 2; 14th, 1; 15th, 3.
1559	Nov. 17	25	Nov. 19	Dec. 15th, 2 men; 16th, 3; 17th, 4; 18th, 2; 21st, 12; 22nd, 2.
1715	Dec. 11	3	Dec. 12	None referred.
1716	Dec. 11	50	Dec. 12	Dec. 22nd, 1 man; 23rd, 1; 24th, 1; 28th 21; 29th, 6; 30th, 2; 31st, 3; Jan. 4 1937, 6 men; 6th, 3; 11th, 1; 12th, 3 13th, 2; 14th, 2; 18th, 3; 19th, 4; 20th 2; 21st, 1.
	1937			*1937*
1878	Jan. 20	25	Immediately	Jan. 22nd, 1 man; 23rd, 1; 25th, 1; 26th, 1; 28th, 2; 30th, 1; Feb. 3rd, 1; 5th, 3; 9th, 1; 11th, 1; 15th, 1; 17th, 1; 18th, 1; 23rd, 1; 25th, 2.

REFERRALS AS TO PLUMBERS

Requisition No.	Date	Number of plumbers	To report—	Referrals and men referred
	1936		*1936*	*1936*
1185	Sept. 14	10	Sept. 15	Sept. 17th, 1 man; 19th, 1; 23d, 1; 24th, 1; 25th, 2; 28th, 1; 30th, 1; Oct. 7th, 1; 8th, 1; 31st, 1; Nov. 2d, 2; 5th, 1.
1233	Sept. 21	10	Sept. 23	Sept. 26th, 1 man; Oct. 9th, 2; 12th, 1; 13th, 2; 14th, 2; 15th, 1; 19th, 1.

The foregoing serves to illustrate the manner and method of referring workmen to plaintiff's project. They are typical of all referrals. A number of those who were referred failed to report. Some workmen reported promptly and were employed, but there was material and serious delay on the part of SES in referring a large number of workmen to the project. Plaintiff employed practically all who reported for work.

Included in the lists of referrals are names of workmen who were brought over from the foundation contract and also a number who were otherwise recruited locally by plaintiff, sent to the Employment Office and formally referred by the Employment Office to plaintiff's project.

12. The requisitions show that plaintiff called for 159 carpenters to December 31, 1936, and that 119 were referred to and employed by plaintiff on the instant project.

13. Plaintiff's pay roll during the period September 3 to December 31, 1936, shows the number of carpenters, brickmasons and cement finishers employed each week during the period as follows:

Period	Carpenters	Brick-masons	Cement finishers
1936			
Sept. 3–Sept. 9	52	1	1
Sept. 10–Sept. 15	49	2	4
Sept. 17–Sept. 23	43	2	0
Sept. 24–Sept. 30	40	1	5
Oct. 1–Oct. 7	57	0	9
Oct. 8–Oct. 14	87	6	16
Oct. 15–Oct. 21	87	24	11
Oct. 22–Oct. 28	84	23	10
Oct. 29–Nov. 4	81	22	11
Nov. 5–Nov. 11	85	23	6
Nov. 12–Nov. 18	90	27	12
Nov. 19–Nov. 25	95	28	10
Nov. 26–Dec. 2	95	32	13
Dec. 3–Dec. 9	96	36	13
Dec. 10–Dec. 16	95	56	13
Dec. 17–Dec. 23	81	63	10
Dec. 24–Dec. 31	82	85	9

14. September 21, 1936, plaintiff telegraphed H. A. Gray, contracting officer and Director of Housing at Washington, as follows:

> Since August thirteenth [thirtieth] endeavored get proper skilled labor through US Employment Service. Progress of work unsatisfactory because necessary mechanics not furnished. Request release from labor provision requiring skilled labor from employment service or time extension to permit work to be completed with limited force of mechanics.

Plaintiff also wrote Gray November 5, 1936, urging action. In this letter plaintiff stated:

> Our shortage of skilled labor still continues and our requisitions are unfilled. Since you have not advised us that we are at liberty to secure workers at our discretion, it is assumed that it is your intention to make an extension of the contract time to adjust this condition.
>
> Your attention is further directed to the contract, Article 9, Delays and Damages, which states: * * *
>
> Our telegram served you with notice of the *acts of the government* which delayed this work, since the United

States Employment Service is a Governmental Agency and our contract required us to secure workmen from that source. Therefore, we shall expect an adjustment of the contract time to cover this delay.

Gray as contracting officer advised plaintiff November 17, 1936, that relief from liquidated damages, if accrued, would be considered at the approach of termination of the contract time.

15. From the beginning of work on the project until the contracting officer on March 26, 1937, acted on plaintiff's request and released him from the labor requirements of art. 20, plaintiff constantly complained of lack of labor for carrying on the work, such complaints being made to V. D. Alden, project manager, to R. H. Krogstad, manager of SES, and to the Labor Commission of Oklahoma and to H. A. Gray, Director of Housing and contracting officer.

16. October 6, 1936, plaintiff advised the manager of SES by letter that the agency had not furnished his requirements in a satisfactory manner in order to carry on the work, and that he had advertised in local papers for men, and was enclosing a list of 10 men who reported as relief eligibles for assignment to the work. He also enclosed a list of names of 22 registered applicants and proposed them for assignment for work on plaintiff's requisitions; also a list of 38 names, with request that they be referred. Plaintiff also stated in the letter that he found an abundance of skilled labor to man the project, if the agency would cooperate in assigning them.

In reply the manager of SES on October 9th advised plaintiff as follows:

> With further reference to the list of names included in your letter of October 6, 1936, will advise I have discussed this matter with Mr. Richard H. Lawrence, Associate Director of this Service. Mr. Lawrence's decision is that we shall not make referrals from this list unless these individuals meet the requirements as set forth in the following points:
>
> No. 1. They must be bona fide residents of Oklahoma County for the past 6 months and of the State for the past year.
>
> No. 2. Their cards must be in the active file at the time referral is made.

> No. 3. They must satisfy the requirements of this office as to competency in the trades or crafts for which they are to be assigned.
>
> Elaborating on these points I might say that a good many of these men have been away from Oklahoma City long enough so they have lost their residency here; in other words they have established residency in some other town and State, although they might have been registered in this office for several years.
>
> Point No. 2—Upon checking the cards of the men on the list you gave me I find a good majority of them are now in our inactive file, which means that the applicant has not contacted this office within the past 30 or 60 days. These men can make their cards active by contacting this office, at which time they will be reinterviewed.
>
> Point No. 3—As these men contact our office they will be questioned as to their ability in the crafts for which you have them listed. If we feel they are competent and qualified to perform the work of that particular craft and they meet the other requirements, then and then only will they be referred. In this connection I might say I have checked quite a few of these cards and find the men showing very little record of employment, and in some cases none whatsoever, in the classifications at which you have them listed. I shall go over each one of the names in your list, case by case, and consider each of these individually.
>
> It is the duty of the Employment Service to refer competent qualified mechanics in their respective classifications, and in order to comply with this duty it will be necessary to proceed as above.

October 12, 1936, plaintiff advised SES that he was the judge of the competency of the workmen in the skilled crafts and that he had placed men on the pay rolls and that the agency would be expected to make the proper assignment.

By letter of October 12, 1936, the manager of SES advised plaintiff as follows:

> This will acknowledge receipt of your letter under date of October 12th in which you request the issuance of assignment slips USES 325 on the list of mechanics furnished by you in your letter of October 6th; due to the fact that you have already hired these gentlemen and have entered their names on your payroll.
>
> I regret very much that we will be unable to comply with your request until such time as these men have been

> interviewed by this office to determine their eligibility and qualifications and their ability to do the work under the classifications on your WPA 401 requisitions.
>
> It is true that the contractor is the sole and final judge as to the fitness of all men whom he hires on a project, but at the same time the Employment Service is charged with the responsibility of referring to the employers men who are qualified under the classifications for which they are registered. Therefore, as I have stated above it will be necessary for us to reinterview these applicants to determine their qualifications before referring them to you for your consideration, due to the fact that in many instances the men included in the list of names submitted by you on October 6th have occupational classifications on our records entirely different from those called for on your requisitions.

November 27, 1936, plaintiff wired J. B. French, Principal Engineer, Inspection Division, Public Works Administration, Washington, as follows:

> Twenty bricklayers requisitioned November tenth, twenty-five November seventeenth. Only four referred. Brick work progress retarded. Am informed workmen going to employment office for referral this job sent to other jobs. Request permission to employ men anywhere available. Request immediate reply in order to run ad in Sunday papers.

In reply, on November 30, 1936, plaintiff received the following telegram from the Director of Inspection Division at Washington:

> Washington office of National Reemployment Service advise that they will wire request to Oklahoma City Office to clear bricklayers to you immediately. Advise us of outcome.

17. December 11, 1936, the manager of SES wrote plaintiff as follows:

> This will acknowledge receipt of your requisition dated December 11th calling for various mechanics of the skilled classifications. Included therein is an item calling for 50 bricklayers to report for work at 7:00 a. m., December 12, 1936.
>
> We have on file at this time your requisition dated November 10th (our requisition No. OSES 1550) calling for 20 bricklayers. On this requisition our records in-

dicate we have referred 16 bricklayers. We also have in our files your requisition dated November 17th calling for 25 bricklayers. Our records indicate that at this writing we have not made any referrals on this requisition.

This letter is to advise that we have made a diligent search of the City, County, and State for bricklayers, to fill these requisitions, and have called upon all public employment offices in the State for any men available. However, due to conditions beyond our control, we are unable to get competent mechanics to report, due to the fact that they are not willing to submit to a pre-employment physical examination.

This letter is your official notification that we are unable to supply bricklayers as called for in your requisitions from within the boundaries of the State of Oklahoma.

18. December 12, 1936, plaintiff wrote the project manager that he was unable to obtain workmen as needed in order to carry on the work. He also requested a waiver of the 130 hour per month limitation and permission to substitute a 40 hour per week limitation on the crafts affected.

December 18, 1936, the Director, Inspection Division, at Washington, acting for the contracting officer, granted plaintiff permission to work bricklayers in excess of 130 hours per month, but not to exceed 8 hours per day and 40 hours per week, for the period expiring February 16, 1937, and without waiving the right to assess liquidated damages.

January 14, 1937, upon plaintiff's request, the Director amended the December 18 letter so as to include crane operators and welders.

19. January 7, 1936, the Oklahoma City Building Trades Council of the American Federation of Labor wrote the following letter to W. A. Pat Murphy, Labor Commissioner of the State of Oklahoma:

This is to notify you that the Oklahoma City Building Trades Council in regular meeting October 7, 1936, officially declared a state of strike and lock-out existing on the Will Rogers Court Housing Project #H 8101, Leo Sanders, Contractor, Oklahoma City, Oklahoma, but was held in abeyance at the request of Mr. R. C. Kirkpatrick, Chief Mediator on Labor Relations Public Works Administration, pending negotiations to attempt settlement of the controversy by his department.

On January 6, 1937, the Oklahoma City Building Trades Council in regular meeting withdrew the hold order on this strike and lock-out and requested that all departments of the Government be notified of this condition existing on Project #H 8101 with the request of [that] the law pertaining to Strikes and Lock-outs be observed.

We feel that your department will give the Building Trades Council your cooperation in this matter.

On the same date, Murphy, who was also the Director of the Oklahoma State Employment Service, wrote the following letter:

To All Managers,
Oklahoma State Employment Service.

Enclosed herewith is copy of a letter from A. E. Edwards, Acting Secretary of the Oklahoma City Building Trades Council, which is self-explanatory.

In all future dealing of the Oklahoma State Employment Service with the Will Rogers Court Housing Project #H 8101, Leo Sanders, Contractor, Oklahoma City, Oklahoma, you will be governed by the rules of the Employment Service pertaining to strikes and lock-outs.

20. This notice was received by SES on January 9, 1937. Thereupon SES invoked the terms of the Wagner-Peyser Act (48 Stat. 113) and section 112 of the Rules and Regulations issued pursuant to said Act. Under said regulations, in the case of a strike, lock-out, or other labor trouble, the Employment Service could not recruit from its files, or personally contact by mail, telegraph, or other means, individuals to be referred to a Public Works or a private project. Any individual desiring employment on such a project had to appear at the Employment Office voluntarily and ask to be referred to that project. Thereupon the Employment Office was required to inform the individual verbally and in writing of the existence of such a strike, lock-out, or other labor trouble, and if the individual would sign a memorandum to the effect that he had been so informed, he was referred to the job and the referral would be marked "nominated by contractor."

After January 9, 1937, SES, in compliance with the Wagner-Peyser Act and the Regulations issued pursuant thereto,

discontinued the recruiting of men for plaintiff's project, but referred all men who signed the notice of lockout. The Employment Agency did not otherwise interfere in any manner with plaintiff's obtaining such men as he needed on the project. But the defendant refused to relieve plaintiff from the requirements of art. 20 of the contract.

21. January 23, 1937, Alden, project engineer, wrote plaintiff as follows:

> A survey of the actual progress made in comparison with scheduled progress as shown on your Monthly Progress Schedule P. W. Form I–III H, Revised, indicate that progress since November 1, 1936, has not been up to schedule.
>
> At present actual progress is shown to be approximately 30%, scheduled progress approximately 50% and contract time elapsed 66%. Thirty-eight items of work show as not having been started on schedule and nine items of work started show as not completed on schedule.
>
> We find it necessary to warn you that this condition indicates the work is not progressing with sufficient speed to complete the project within the contract time.
>
> You are urged to clear up all outstanding approvals and tests, delays in material deliveries, and to organize your forces so that the delay occasioned in the past may be overcome, and progress be brought up to schedule.

January 28, 1937, plaintiff replied as follows:

> Your letter of January 23rd regarding progress has been received. I am greatly surprised that you would write such a letter when we have repeatedly called to your attention the attitude of the Employment Office and the delay occasioned by them regarding the referral of mechanics requisitioned by us for our work on the above Project. For the past four months, we have called to your attention the fact that the work was being held up and we requested that we be released from the necessity of securing our workmen through the Employment office. No action has been taken by you or your superiors in this matter.
>
> You are further informed, in regard to outstanding approvals, that the right of approval is vested in the Housing Division and not in ourselves. We have submitted all necessary materials for approval to the Hous-

ing Division. The fact that such approvals have not been secured is beyond my control.

Your suggestion that the force be organized to overcome the delay that has been occasioned in the past is not practical. The work is progressing as rapidly as conditions permit and will be completed at the earliest possible date.

22. March 1, 1937, plaintiff wrote the contracting officer, H. A. Gray, Director of Housing, as follows:

> You are advised that the referral agency is continuing to refuse to make referrals of workmen to the above project for mechanics as requested.
>
> This practice has continued for several months. The State Employment Office has refused to cooperate and the progress of the job has been greatly damaged. Approximately three weeks ago, we requisitioned painters. We have already sent you a copy of a letter from the Employment office stating that, due to the alleged strike, they could not make referrals from their active files to our Project but would assign men who went to the Employment office. We sent qualified workmen to them, residents of this City who were registered in the Employment office, after they had failed to send workmen. The Employment Office then refused to refer these men to the project, stating there were plenty of painters on relief rolls if a way could be found to make the referrals.
>
> The painters needed have not yet been referred. I enclose herewith affidavit of three men, made in the presence of a Notary Public, concerning this matter.
>
> In conformity with the contract, you are again notified that for several months we have requested you to release us from the provision of the contract requiring assignment of men from the Employment Service. You have failed to do this and in strict accordance with the contract between us, we herewith renew our notice to you that we shall expect extension of time and damages to compensate us for the delay which has been caused by the referral agency. The extent of damages and delay will be computed at the end of the contract, in conformity with the facts and the record.

Sometime in March 1937 the Employment Service advised the Housing Division that it was unable to procure workmen for the project, and on March 26, 1937, the contracting officer advised plaintiff that he might approve employment of qualified mechanics as "highly skilled workers," without recourse

to the Employment Service, in sufficient numbers to man the project to successful completion. From March 26, 1937, plaintiff was allowed to and did obtain skilled and semi-skilled labor from any source available without applying to the Employment Service. He immediately and in the following months greatly increased his force of skilled workmen.

23. June 28, 1937, plaintiff, in response to defendant's request, submitted a bid for certain extra work consisting of the installation of a medium gas pressure system in connection with the project. This bid was accepted, and on August 30, 1937, change order no. 14 was issued by the defendant and accepted by plaintiff.

The bid set forth a detailed estimate of the work to be performed including the services of a foreman for outside work and engineering services, and also included 10% overhead and 10% profit, the total amount being $6,267.75.

The change order contains the following statement:

> Now, THEREFORE, an equitable adjustment of the contract time for this change is hereby established, as follows:
>
> THE CONTRACT PRICE IS INCREASED Six Thousand Two Hundred Sixty-seven and 75/100 Dollars ($6,267.75); and
>
> THE CONTRACT TIME IS EXTENDED Sixty (60) calendar days; provided, however, that the consent of each of your sureties shall be obtained and filed with the Contracting Officer before this Change Order shall become binding insofar as the extension of time is concerned.
>
> * * * * *
>
> This change order expressly satisfies any and all claims against the United States of America of whatsoever nature or purpose incidental to or as a consequence of the change herein described.

The change order was the subject of the negotiation. There is no evidence that any part of the additional time of sixty days allowed therein in connection with the additional work had any relation to or was on account of any delay in connection with performance of the original contract work. The surety on plaintiff's bond consented in writing to the

change order and stated, in such consent, that the period allowed would operate "so as to require that the time for completion of all work embraced in said contract shall be extended 60 days."

24. July 20, 1937, the Director of the Inspection Division wrote plaintiff as follows:

> This will acknowledge receipt of your letter dated July 13 which supplements your previous report of labor shortage and requests establishment of the 40-hour week for the following workers:
>
> | | |
> |---|---|
> | Electric Welders | Bricklayers |
> | Machine Operators | Lathers |
> | Carpenters | Painters |
> | Plasterers | Plumbers |
> | Electricians | |
>
> Due to the existence of special and unusual circumstances, it will be found impracticable to require adherence to the 130-hour limitation of your contract and permission is hereby given to work the above trades on a 40-hour week basis not to exceed eight hours per day.
>
> This relaxation of hours is for a definite period expiring August 31, 1937, and is subject to all conditions of our former approval of December 18, 1936.

25. Plaintiff completed the contract September 4, 1937, 73 calendar days after expiration of the contract time as extended by change orders. The contracting officer, who then was the Administrator of U. S. Housing, on July 22, 1938, made findings of fact in which he determined that the Employment Service was dilatory in referring skilled workmen to plaintiff on his requisitions and that the delay in carrying on and completing the work was beyond plaintiff's control.

Pursuant to these findings payment was made to plaintiff of the balance due under the contract and no liquidated damages were assessed against plaintiff by reason of the delay of 73 days.

26. Soon after receipt of these findings plaintiff filed a claim in the sum of $48,572.61 for damages alleged to have been sustained by reason of the failure of defendant to furnish an adequate supply of labor under art. 20 of the contract for 133 days' delay from April 24, 1937, the original

completion date, to September 4, 1937, when the project was accepted, as follows:

Supervisory pay-roll expense	$29, 813. 88
Rental on equipment for the idle time	11, 724. 91
Interest on deferred payments	6, 634. 82
Field office expense	399. 00
	48, 572. 61

27. The last two items are not now claimed. Plaintiff incurred during the period of 133 days from April 24 to September 4, 1937, and he now claims $28,995.88 for supervisory pay-roll expenditures, including workmen's compensation, public liability and unemployment insurance and Social Security taxes, after deducting such expenses with respect to extra work under change order 14 and a sewer lift station covered by a separate contract. The other item claimed is equipment rental of $11,724.91, which, for a period of 133 days, is reasonable. These two amounts total $40,720.79.

28. For the period of 73 days from June 23, 1937, the contract time for completion as extended under an extra work change order, to September 4, 1937, the date of completion, such supervisory and other expenses were $15,914.73, and the reasonable rental value of equipment used on the job was $6,435.68. These amounts total $22,350.41.

29. Plaintiff's claim for reimbursement for supervisory pay roll and other expenses above mentioned and for compensation for rental of equipment was referred by the Comptroller General February 2, 1940, to the Administrator of the U. S. Housing Authority for consideration. The Comptroller concurred in the administrator's letter of July 22, 1938, in which he made a finding that plaintiff should be relieved of liquidated damages for the period of delay listed in the certificate of completion—namely, 73 days.

The Administrator, Nathan Straus, in a letter to the Comptroller of September 10, 1940, made findings, after an examination of plaintiff's records and the evidence submitted, that from April 24 to September 4, 1937 (a period of 133 days), plaintiff expended $28,995.88 to cover supervisory pay roll, workmen's compensation, public liability and unemployment insurance, and Social Security taxes; that for such a period the reasonable rental value on major items of equip-

ment for the necessary stand-by and useful service time was $11,725; that interest, computed at 6% on deferred payments 8 to 10, inclusive, was $6,634.82, and that plaintiff actually paid interest of $3,295.57 on money borrowed during that period and used in completion of the work.

The Administrator found, however, that if plaintiff's claim could be allowed and paid administratively, he was only entitled to reimbursement and compensation for 73 days (June 23 to September 4, 1937), or 73/133ds of the supervisory payroll expenses and equipment rental, or a total sum of $22,-350.41. The Administrator disallowed the claim for interest.

The Administrator's findings and conclusions in his letters of July 22, 1938, and May 28, 1940, are in evidence as plaintiff's exhibits 63 and 65, which are made a part hereof by reference.

30. The Employment Service delayed unreasonably in referring skilled workmen to the project. As to a large number of skilled workmen, the time elapsing between requisition and referral of workmen was at times 30 to 90 days, and at times greater. On a number of occasions practically no workmen at all were referred in response to requisitions. This delay was beyond the control and without the fault of plaintiff. The effect of this situation disorganized the work and was the cause of 73-days' delay in completion of the work. The extra costs and damages to plaintiff by reason of this delay of 73 days were $22,350.41, as set forth in finding 28.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court.

The question presented is whether the defendant unreasonably delayed plaintiff in the completion of the contract of July 9, 1936, by failing to exercise proper diligence and to furnish with reasonable promptness an adequate number of skilled and semi-skilled workmen, and in declining for an unreasonable length of time to release plaintiff from the requirements of art. 20 of the contract (finding 4) on account of the failure or inability of the Employment Service to furnish or refer sufficient workmen to properly man the job.

We think defendant did unreasonably delay plaintiff. The facts established by the evidence show that plaintiff was seriously delayed in the completion of the contract for want of an adequate number of skilled workmen and that defendant delayed unreasonably in obtaining information as to workmen available locally for referral to the job from relief and unemployed rolls. A very large number of unemployed skilled workmen were available locally and in surrounding counties in Oklahoma, many were on the relief rolls, and others were on the rolls of the twenty-seven employment service offices in Oklahoma. If the workmen who were available for referral had been promptly referred by the employment service upon plaintiff's requisitions, as the contract contemplated would be done, plaintiff would have been able to complete the contract work by or before June 23, 1937, the expiration date of the contract time as extended by an extra work order.

The facts also show that defendant delayed unreasonably in acting upon and granting plaintiff's protests and requests made continuously from September 21, 1936, that such workmen be furnished or that he be released from the requirements of art. 20 in order that he might directly obtain and employ such workmen who were available and could have been obtained in large numbers locally and throughout the State of Oklahoma. When, on March 26, 1937, defendant waived the employment service requirement of the contract plaintiff immediately and continuously thereafter greatly increased his force of skilled workmen in substantial accord with the requirements of the work, but due to the delay which had occurred as a result of his inability to obtain such workmen through the employment service he was unable to complete the work on time although he made every effort to do so. There was a delay of 73 days when the work was completed on September 7, 1937. This delay was due to the fault of the defendant and was without the fault or negligence of plaintiff.

Except for the delay caused by the above-mentioned failures of defendant plaintiff would have been able to complete the work on or before the expiration date of the contract as extended. Since the delay was due to the failure of defend-

ant to fulfill the duties required of it under art. 20 of the contract there was a breach thereof, and plaintiff is entitled to recover the extra costs and damages amounting to $22,350.41 occasioned by such delay (finding 28).

Plaintiff contends that if the Employment Service had been diligent and if the available skilled workmen had been referred with reasonable promptness or if, in the circumstances, he had been relieved at the proper time of the requirement that he obtain such workmen through the employment service office, he could and would have completed the work, including the amount of work required under change order 14, within the original contract time of 270 days and substantially in accordance with his original progress schedule. This is probably true, as the Administrator of the U. S. Housing Authority concluded from the evidence before him, but in the change order given April 10, 1937, and formally issued August 30, 1937, the parties agreed upon a new contract period for completion of 330 days which expired June 23, 1937. The change order calling for additional work and allowing 60 days additional time, by reason thereof, cannot be regarded in whole or in part as merely an extension of time by the defendant on account of delay in connection with the original contract work, if it had been work such as would not operate to relieve the Government of liability for damages for breach of its contract by causing the delay for which such an extension is granted. Cf. *Seeds & Derham* v. *United States*, 92 C. Cls. 97. Under the terms of the order which was accepted by plaintiff and his sureties in writing, the additional 60 days agreed upon became a part of the original contract period of 270 days for completion for any and all purposes. The change order was made under and fulfilled the requirements of the equitable adjustment provisions of the contract. It was without restriction or qualification and the additional time applied to the completion of the original as well as to the additional work specified therein. Both parties became entitled to the full benefit of the new contract period of 330 days and either party could point to it in defense of a claim by the other party for damages for delay. *Blair* v. *United States*, 321 U. S. 730, 734.

Counsel for defendant contend, in addition to the contention that the Employment Service referred to in art. 20 acted throughout with reasonable diligence, promptness and efficiency, that plaintiff's delay in completing the superstructure contract was primarily caused by an existing strike of union workmen, formal notice of which was served on defendant's employment service January 9, 1937, and that defendant was not responsible in damages for such delay. There was a strike when certain of the union workmen who had been obtained through the unions and employed by plaintiff on the foundation contract quit work for the reason stated in the findings and the unions refused to furnish plaintiff skilled union workmen on the contract in suit, but under the contract plaintiff was entitled to use nonunion skilled workmen and he was required to obtain such workmen through the employment service unless and until he was released from that requirement. The plaintiff, although authorized by art. 20 to do so, was not required by that article to obtain the necessary skilled and semi-skilled workmen through or from the unions, but could secure them through the employment service. He endeavored to do so without success. However, upon receipt on January 9, 1937, of formal notice from the Oklahoma Building Trades Council that a strike existed on the project the Employment Service ceased and declined further to select and refer workmen on plaintiff's requisitions unless such workmen voluntarily came to the employment service office, asked to be referred, and signed a statement that he had been advised of the existence of the strike. The Employment Service took this action under the Wagner-Peyser Act (48 Stat. 113). As a result of this situation plaintiff was able to obtain only a very few skilled workmen through the employment service office, due evidently to the fact that available nonunion workmen did not wish to sign a document which in effect amounted to a request that they be employed on a project on which a strike existed. Except for the requirement of art. 20 and the conditions imposed by the employment service on referrals, plaintiff on and after January 9, 1937, could have obtained and employed an adequate

number of workmen to carry on the work, and he did so when, on March 26, 1937, defendant released him from the requirements of art. 20 of the contract. Defendant delayed unreasonably in taking this action.

We think it was intended that neither the Wagner-Peyser Act nor art. 20 of the contract should operate, under such circumstances as are here presented, to hamper a contractor in employing on a work-relief project workers who were without jobs and who were willing to work thereon if employed directly by the contractor. That plaintiff could have obtained such workmen is shown by the fact that upon being released from the requirements of art. 20, that he obtain skilled workmen through the employment service, he immediately increased the number of workmen by 114 men and soon thereafter the number of workmen were increased by 224 men. All the additional workmen, except a few bricklayers (all of the 85 houses called for by the contract were of brick construction), were obtained from Oklahoma City and surrounding counties as a result of plaintiff's advertisements in local papers for skilled workers in various classes.

There is in the record reference to some bad weather in February 1937 and to a controversy from December 28, 1936 to March 13, 1937, with reference to a drawing for installation of boilers and steam lines. The boilers were promptly installed by plaintiff and no change was necessary since the drawing as submitted was approved March 13, 1937. The evidence satisfactorily shows that completion of the contract work as a whole was not delayed either by bad weather or by the boiler controversy.

Plaintiff is entitled to recover $22,350.41 and judgment will be entered accordingly. It is so ordered.

Madden, *Judge;* Whitaker, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

EDWARD L. BURTON v. THE UNITED STATES

[No. 45735. Decided May 7, 1945]

On the Proofs

Gift tax; future interests of benficiaries under trust deed; discretionary power in trustees.—Where plaintiff, on December 1, 1936, executed a written deed of trust of certain properties for the benefit of his five children, who were named individually in the trust instrument, and his grandchildren, of whom nine were then living; with the shares of deceased children and grandchildren to go to their respective issue, if any, and the shares of children and grandchildren dying without issue to go to the grandchildren as a group; and where the trust could be terminated after a period of 10 years by unanimous consent of the trustees; and where the trustees, of which the grantor was one, were directed to allocate, in their discretion, the net income of the trust, if and as received, to the beneficiaries; it is *held* that the interests of the beneficiaries in the income, as well as in the corpus, were uncertain and future as defined by the pertinent Treasury Regulations, and under the provisions of the Revenue Act of 1932, the donor was entitled to but one deduction of $5,000 on account of the gift to the trustees in 1936, rather than a $5,000 deduction for each of the 12 then existing beneficiaries.

Same; intention of donor.—Where the trust instrument provided that distribution, both as to time and amounts, should be made at the discretion of the trustees; and where it was further provided that the interest of a beneficiary should not "vest" until he became "entitled to receive and demand, absolutely and forthwith, the income or principal" in question; it must be concluded that the donor intended that a presumptive beneficiary should have no right to demand or transfer his prospective share in the income until the trustees, in their discretion, decided to make a disbursement; and the interest of each beneficiary was, therefore, a future interest.

The Reporter's statement of the case:

Mr. Clarence F. Rothenburg for the plaintiff. *Messrs. Hamel, Park & Saunders* were on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the evidence and a stipulation of the parties:

1. Plaintiff, hereinafter sometimes called the donor, is an individual, a citizen of the United States, residing in Salt Lake City, Utah.

2. On April 24, 1936, plaintiff made cash gifts of $1,200 each to his daughters, Leah Burton Burrows and Sarah Burton Moreton.

3. On December 1, 1936, plaintiff executed a written declaration of trust, hereinafter sometimes called "the trust," of certain properties for the benefit of plaintiff's children and grandchildren, and this trust was thereafter known as the "Edward L. Burton Trust." The trust instrument contained the following language pertinent to this litigation:

> 1. The trust hereby created shall be irrevocable by grantor.
>
> 2. The trustees shall have power to invest, reinvest, encumber and dispose of the whole or any part of the trust property and to acquire other assets when in their judgment such action is necessary to preserve the corpus of the trust; in furtherance, and not in derogation of the foregoing powers, the trustees may execute and deliver transfers and conveyances and may discharge mortgages and other liens.
>
> * * * * *
>
> 5. Subject to the provisions of paragraph 7 hereof respecting advances for the maintenance and welfare of Isabelle Armstrong Burton, grantor's wife, the trustee shall allocate the net income from said trust, if and as received, in the manner following: Fifty (50%) percent thereof to grantor's five children, Sarah Burton Moreton, Leah Burton Burrows, Edward L. Burton, Jr., Francis A. Burton and Robert H. Burton, and fifty (50%) percent thereof to grantor's grandchildren, and as often and in such amounts as the trustees shall deem advisable disbursement thereof shall be made in the manner following: Fifty (50%) percent thereof shall be divided equally among grantor's five children, if living, and fifty (50%) percent thereof shall be distributed equally among grantor's grandchildren as a group. If at any time prior to the termination of this trust any child of grantor dies leaving issue, then the amount or amounts which such deceased child of grantor would have received if living shall be paid, share and share

alike, to the children of said deceased child of grantor; and if at any time prior to the termination of this trust any child of grantor dies without issue, then the amount or amounts which such deceased child of grantor would have received if living shall be paid to grantor's grandchildren as a group. If at any time prior to the termination of this trust any grandchild of grantor dies leaving issue, then the amount or amounts which such deceased grandchild of grantor would have received if living shall be paid, share and share alike, to the children of said deceased grandchild of grantor; and if at any time prior to the termination of this trust any grandchild of grantor dies without issue, then the amount or amounts which such deceased grandchild of grantor would have received if living shall be paid to grantor's grandchildren as a group. Distribution of income or principal payable to grantor's grandchildren as a group shall be made to said grandchildren not per stirpes but share and share alike, and if hereafter issue are born to any of grantor's children such future born issue shall be entitled to participate in the same manner and to the same extent as if now living.

6. The within trust shall be terminable by unanimous consent of all trustees at any time after ten years shall have elapsed, but in no event shall this trust continue for more than twenty-one years from this date. At the termination of this trust all property remaining, whether principal or income, shall be distributed among grantor's children and grandchildren in the same manner and proportions as is set forth in paragraph 5 above with respect to income.

7. Notwithstanding the provisions of paragraphs 5 and 6 above directing payment of income and distribution of principal to the children and grandchildren of grantor, if a condition shall hereafter arise which, in the opinion of the trustees renders it necessary or desirable that provision be made from the income or corpus of the within trust for the maintenance or welfare of grantor's aforesaid wife, Isabelle Armstrong Burton, then and in such event the trustees shall be, and they hereby are, authorized and directed to pay from time to time and from either the income or the principal of this trust, such sums as the said trustees may consider necessary to provide adequately for grantor's said wife.

8. The respective interests of beneficiaries in the trust fund created hereby shall in no case vest in such beneficiaries until they, respectively, shall become entitled to receive and demand, absolutely and forthwith, the in-

come or principal of the said trust fund to which they, respectively, may be entitled hereunder, and such beneficiaries shall have no control whatsoever over, or interest in, said trust fund, except as herein provided; and they shall have no right or authority to assign or anticipate any income or share to which they may be entitled under the provisions of this agreement, and the interests of said beneficiaries and each of them, either in the principal or the income, shall not be liable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of the said beneficiaries, or either of them, of whatsoever character.

9. Whenever any payment hereunder, whether of income or principal, is to be made by said trustees to any of the lineal descendants of grantor who may be minors at the time of such payment, except distribution and payment made by the trustees at the termination of this trust, it may, in the sole discretion of said trustees, be paid to said minor child direct, to either of his or her parents, to his or her legal guardian or guardians, to person or persons with whom said minor resides, or direct to any other firm, person or corporation for services rendered, property delivered or maintenance or support furnished for said minor, and any such payment so made for or on behalf of said minor child shall be deemed in all respects as though the payment were made to said minor child direct or to his or her legally appointed guardian, and the recipient of such payment, if the parent or person with whom such minor child resides, shall not be accountable after receipt of any payment, for the application thereof for the use and benefit of such minor child.

10. The trustees shall render an account annually to grantor's children as well as to such of grantor's grandchildren as shall have attained majority.

* * * * *

16. The trustees shall keep proper books showing the various receipts and disbursements involved in the operation of the trust, which books may be inspected at any time by any beneficiary who may be of age.

4. On December 1, 1936, plaintiff transferred to the trustees a 5% first mortgage bond of the Utah-Idaho Sugar Company due March 1, 1946, and having a par value of $1,000, and a fair market value of the same amount. On December 26, 1936, plaintiff transferred to the trustees 293 shares of the

capital stock of the Edward L. Burton Corporation, having a fair market value of $413.76 per share on that date.

5. On the dates of the transfers previously described, the living beneficiaries of the trust were as follows:

Children of plaintiff	Age	Grandchildren of plaintiff	Age
		Isabel Moreton	14
Sarah Burton Moreton	38	Mary Elizabeth Moreton	11
		Sarah Adele Moreton	8
		Edward Burton Moreton	4
Leah Burton Burrows	36	Leah Burrows	11
		Isabel Marion Burrows	7
Edward L. Burton, Jr.	34	Edward L. Burton, III	3
Francis A. Burton	32	Catherine Rigby Burton	9
Robert H. Burton	29	Robert William Burton	[1]

[1] 1 month.

6. On March 15, 1937, plaintiff filed with the Collector of Internal Revenue at Salt Lake City, Utah, a gift tax return for the year 1936, setting forth the gifts referred to in finding 4, and showing a gift tax liability thereon in the amount of $117.16, which he paid on March 15, 1937. In computing the amount of the gifts shown on that return, plaintiff excluded the sum of $5,000 in respect of each of the aforesaid beneficiaries of the Edward L. Burton Trust, or an aggregate of $70,000. A copy of that gift tax return is attached to the stipulation as Joint Exhibit 2, and made a part hereof by reference.

7. During each of the calendar years 1936, 1937, and 1938, the trustees of the trust, pursuant to paragraph 5 of the trust agreement, quoted in finding 3, allocated fifty percent of the net income of the trust which they had received, to the donor's five children named in finding 5, and the other fifty percent to the donor's nine grandchildren named in finding 5, by crediting the account of each child and grandchild on the ledger of the trust with his or her proportionate part of the net income. At the same time the trustees charged a profit and loss account in the said ledger with corresponding amounts. During each of the calendar years 1939 through 1943, the trustees allocated fifty percent of the net income received during that year to the donor's five children named in finding 5, as a group, by crediting a group account in the ledger. During each of these same years, the trustees allocated the other fifty percent of the net income to the

donor's nine grandchildren named in finding 5, as a group, by crediting a group account for the grandchildren in the ledger. The amounts credited to the children and grandchildren as groups, were charged by the trustees to the profit and loss account, hereinbefore referred to. Copies of pages from the ledger showing entries applicable to the trust are attached to the stipulation herein as Joint Exhibits 3, 4, 5, 6, and 7, and made a part hereof by reference.

8. During each of the calendar years 1936, 1937, and 1938, each of the donor's children and grandchildren was notified by the trustees in writing that his portion of the net income of the trust for the said years had been allocated to him by the trustees, and he was advised to include his share thereof in his individual income tax returns respectively filed by him for that year. The trust itself reported no taxable income for any of those years. During the years 1939 through 1943, inclusive, upon the advice of legal counsel, the net income of the trust was allocated to the children and grandchildren, as groups, as shown in finding 7, and was included in federal income tax returns filed by the trust for those years.

9. Mrs. Isabelle A. Burton, the donor's wife, reported taxable net income for the years, 1936 to 1943, inclusive, as follows:

	Amount
1936	$8, 565. 60
1937	10, 018. 29
1938	1, 916. 74
1939	11, 428. 26
1940	10, 796. 51
1941	9, 382. 93
1942	6, 003. 15
1943	9, 638. 51

Mrs. Burton sustained a capital loss of $12,962.07 in 1938, which accounted for her low taxable income in that year.

10. Subsequently the Commissioner of Internal Revenue determined that the gifts in trust recited in finding 4 were gifts of future interests in property and reduced the total exclusions from $70,000, referred to in finding 6, to $7,400, representing one exclusion of $5,000 on account of the gift to the Edward L. Burton Trust, and $2,400 on account of the cash gifts to the daughters set forth in finding 2.

11. On the basis of the Commissioner's determination set forth in finding 10, and with certain other adjustments which are not in controversy, the Commissioner, on September 12, 1938, issued a notice of deficiency in plaintiff's federal gift tax liability for the year 1936 in the amount of $7,120.36.

12. On February 8, 1939, the deficiency stated in the letter of September 12, 1938, was paid in full, together with interest in the sum of $821.18.

13. On June 29, 1940, plaintiff duly filed with the Collector of Internal Revenue at Salt Lake City, Utah, a claim for refund of gift tax for the year 1936 in the amount of $5,901.76, on the basis that plaintiff was entitled, under the provisions of Section 504 (b) of the Revenue Act of 1932, to an exclusion of $5,000 each in respect of the fourteen beneficiaries of the Edward L. Burton trust, hereinbefore referred to. A copy of the claim for refund is attached to the stipulation as Joint Exhibit 9.

14. The claim for refund was disallowed by the Commissioner of Internal Revenue and on August 13, 1940, he mailed a notice of his disallowance to the plaintiff by registered mail.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff complains that he was required to pay a federal gift tax larger by $5,901.76 than the law required, on gifts made by him in 1936 in trust for his children and grandchildren. In that year he executed a declaration of trust, the pertinent provisions of which are quoted at length in finding 3. The question here litigated is whether the interests given to the plaintiff's children and grandchildren by the trust instrument were, as the Government claims, future interests. The Internal Revenue Act of 1932, in Section 501, imposed a tax on gifts, whether in trust or otherwise, and in Section 502 provided how the tax should be computed. Section 504 provided:

> SEC. 504. NET GIFTS.
>
> (a) General definition.—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) Gifts less than $5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

Article 11, Treasury Department Regulations 79 (1936 Edition), relating to the exclusions under Section 504 (b), *supra*, is as follows:

> ART. 11. Future interests in property.—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * * But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. For valuation of future interests, see subdivision (7) of article 19.

There were five children and nine grandchildren alive at the time the gifts here in question were put into the trust. If the interests of the fourteen beneficiaries were not future interests, then the donor, the plaintiff, was entitled to take a deduction of $5,000 for each of them, or $70,000 in all, in computing the amount of his gifts in that year for gift-tax purposes. If the interests of the beneficiaries were future interests, only one deduction of $5,000, that on the gift to the trustees, could be taken. The plaintiff, pursuant to a deficiency notice from the Commissioner of Internal Revenue, paid a gift tax on the basis of only one deduction of $5,000, and sues here to recover the difference between that payment and what he would have paid if he had been allowed fourteen deductions of $5,000 each.

Paragraph 5 of the trust instrument, quoted in finding 3, named the plaintiff's five children individually, but only designated the grandchildren as a group. It directed the trustee, subject to the power given in paragraph 7, to provide for the welfare of the plaintiff's wife out of income or princi-

pal, to "allocate" the net income of the trust, 50% to the five named children and 50% to the grandchildren—

> and as often and in such amounts as the trustees shall deem advisable disbursement thereof shall be made in the manner following: Fifty percent (50%) thereof shall be divided equally among grantor's five children, if living, and fifty (50%) percent thereof shall be distributed equally among grantor's grandchildren as a group.

The paragraph then provided that if at any time prior to the termination of the trust a child died, that child's children should take the amounts which the child "would have received if living" but if the child died without issue such amounts should be paid to the grandchildren as a group. It made the same provision for the case of the death of a grandchild during the life of the trust. It provided that distribution of income or principal to grandchildren as a group should be made, not *per stirpes*, but share and share alike, and said—

> if hereafter issue are born to any of grantor's children such future born issue shall be entitled to participate in the same manner and to the same extent as if now living.

Paragraph 6 provided that the trust could be terminated by the unanimous action of the trustees at any time after ten years, and should in any event terminate at the end of 21 years; and that at termination all remaining principal and income should be distributed among the children and grandchildren in the manner provided in paragraph 5 for the distribution of income. Paragraph 7, as we have said, gave the trustees power "if a condition shall hereafter arise which, in the opinion of the trustees, makes it necessary or desirable that provision be made for the maintenance or welfare of" the grantor's wife, to use income or principal "to provide adequately" for her. Paragraph 8 was as follows:

> 8. The respective interests of beneficiaries in the trust fund created hereby shall in no case vest in such beneficiaries until they, respectively, shall become entitled to receive and demand, absolutely and forthwith, the income or principal of the said trust fund to which they, respectively, may be entitled hereunder, and such bene-

> ficiaries shall have no control whatsoever over, or interest in, said trust fund, except as herein provided; and they shall have no right or authority to assign or anticipate any income or share to which they may be entitled under the provisions of this agreement, and the interests of said beneficiaries and each of them, either in the principal or the income, shall not be liable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of the said beneficiaries, or either of them, of whatsoever character.

Paragraph 9 provided that whenever payments were to be made, except final distribution at the termination of the trust, to any minor beneficiary, they might be made, in the sole discretion of the trustees, to the minor, either of his parents, his guardian, persons with whom he resided, or to persons who had furnished services or property or maintenance or support to the minor. Paragraph 10 directed the trustees to render an annual account to each adult beneficiary. Paragraph 16 directed the trustees to keep proper accounts, and to allow them to be inspected by any adult beneficiary.

We think the gifts here involved were gifts of future interests. As to the corpus of the property given, we do not understand the plaintiff to contend otherwise. Who would get the corpus at the termination of the trust was, and will be until that termination, uncertain. Those of the children, and of the grandchildren living at the creation of the trust, and of other grandchildren born since that time, who are alive at the time of the termination, will get the corpus. The gift is, as to each, contingent upon the existence of a state of affairs at a future time. It is a future interest, by any definition.

The gift of income was, at the time the property was put into the trust, likewise future and uncertain. The Government claims that, under the trust, the income could have been accumulated by the trustees until the termination of the trust. If so, its status would be just like that of the corpus. The plaintiff, on the other hand, urges that the direction in paragraph 5 of the trust instrument that the trustees should allocate the income, if and when received, one-half to the five children, and one-half to the grandchildren, gave the bene-

ficiaries present interests in the income. But the trust instrument, after directing the allocation, continued

> and as often and in such amounts as the trustees shall deem advisable disbursement thereof shall be made in the manner following: Fifty (50%) percent thereof shall be divided equally among grantor's five children, if living, and fifty (50%) percent thereof shall be distributed equally among grantor's grandchildren as a group.

The instrument then directed the substitution of issue of children or grandchildren who died, to take "the amount or amounts which such deceased (child or grandchild) would have received if living." Under this provision it would be difficult for a spouse or creditor or devisee of a deceased child or grandchild to get a part of the income, even if it had been "allocated" to the deceased before his death, if it had not in fact been paid to him. Only by reading out of the instrument the express language providing for disbursements "as often and in such amounts as the trustees shall deem advisable" could we say that "allocation" by the trustees created an interest which was not uncertain as to when, if ever, any particular beneficiary would get possession of the subject of it. The language of paragraph 8 fortifies this view by saying that the interest of a beneficiary shall not "vest" until he "becomes entitled to receive and demand, absolutely and forthwith, the income or principal" in question. When the grantor used both the language of paragraph 5 giving discretion to the trustees as to the time and amounts of distribution, and the language of paragraph 8 just quoted, one must conclude that he meant that a presumptive beneficiary should have no right to demand or transfer his prospective share in the income until the trustees decided to make a disbursement. If not, his interest was uncertain as to when, if ever, he would get any of the income. It was a future interest.

The plaintiff urges that that grantor could not have meant what we think he said and meant because one of his daughters was thirty-eight years old at the time of the gift, and he cannot be supposed to have intended that she should get nothing out of the gift until, if the trust ran for the full term of twenty-one years, she was fifty-nine. But the grantor was

one of the three trustees, and another was of the same name as, and was, probably, one of the grantor's children, a beneficiary of the trust. The grantor may well have supposed that he could lodge discretion in such trustees without danger that they would, in fact, refuse to disburse the income with due consideration for the beneficiaries. We do not have the benefit of any construction of the trust instrument by the Utah courts. We are not told whether the trustees, of whom the plaintiff was one, did in fact distribute the income as soon as it was allocated, as the plaintiff here contends was their duty. Their method of allocation of the income during the years 1939–1943, and their return of it as income taxable to the trust, and not to the beneficiaries, as shown in finding 8, seems to show that their counsel did not think the beneficiaries had any right to demand disbursement of it.

Even if we are wrong in concluding that "allocation" of the income on the trustees' ledger did not give the beneficiaries present interests in the income, we would still conclude that the gift of income, when made, was a gift of a future interest. When, on December 26, 1936, the plaintiff transferred the large amount of stock to the trustees, no one of the fourteen presumptive beneficiaries living at that time obtained any assured interest in the future income of that stock. Each one had to live at least to the date of "allocation" to be entitled to a share. His interest, even to a share in one year's income, was both future and uncertain. And if he survived the date of the first allocation, his interest in any further income later received would be both future and uncertain, as to each amount of income received by the trustees and allocated to the beneficiaries from time to time during the period of the trust. The grantor, by the language of paragraph 8 of the trust instrument, made that clear. The complexities of computation which were sought to be avoided by the statutory denial of exemption to gifts of future interests, *Fondren* v. *Commissioner*, 324 U. S. 18, January 29, 1945, would be present to a considerable degree.

We have not discussed the effect of the provision in paragraph 7 of the trust instrument directing the trustees to use principal and income of the trust, if necessary or desirable, to make provision for the grantor's wife. Thinking, as we

do, that the gifts in question were gifts of future interests, regardless of the effect of paragraph 7, we have not considered its effect, since whatever effect it might have would only tend to fortify the conclusion which we have reached independently of it.

The petition will be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

NEWPORT INDUSTRIES, INC. v. THE UNITED STATES

[No 45527. Decided May 7, 1945]

On the Proofs

Income tax; reopening of refund claim; statute of limitation; informal claim in form of amended depreciation schedule.—Where the taxpayer, plaintiff, filed its income tax for 1936 on March 15, 1937, the tax shown being paid in four installments, and the last payment being December 17, 1937; and where, in October 1939, after an examination and audit of the return for 1936, and later years, by an agent of the Internal Revenue Bureau, and at the agent's request, plaintiff filed schedules supporting the depreciation deductions in the 1936 return, which schedules showed that the deduction for depreciation taken in the 1936 return had been understated; and where, thereafter, on June 14, 1940, the audit report disclosed an overassessment in plaintiff's tax for 1936, due to the understatement of the deductions for depreciation, which overassessment was accepted on that date by taxpayer, and approved by the Commissioner of Internal Revenue in October 1940; it is *held* that a formal claim for refund filed on January 8, 1941 was barred by the statute, (49 Stat. 1648, 1731).

Same; depreciation schedules not an informal claim for refund.—The depreciation schedules prepared by taxpayer did not constitute an informal claim for refund filed within three years from the time the return was filed on March 15, 1937, or within two years from the last payment on the 1936 tax on December 17, 1937.

Same; rejected claim for refund.—Even if it could be assumed that the depreciation schedules prepared and submitted in October 1939 amounted to an informal claim for refund, such claim had been rejected as insufficient by the Commissioner in October 1940 when he refused to make a refund for 1936 and plaintiff had been notified on December 10, 1940, that any refund for 1936 was barred before plaintiff undertook by formal claim of January 8, 1941, to amend or perfect this alleged informal claim.

Same; amendment of refund claim after rejection.—A refund claim, formal or informal, cannot be amended or perfected as a matter of right after it has been denied or rejected, and after the period of limitation has expired. *Sugar Land Railway Company* v. *United States*, 71 C. Cls. 628, 635; *Cuban American Sugar Company* v. *United States*, 89 C. Cls. 215, 225, cited. Cf. *B. Altman & Company* v. *United States*, 69 C. Cls. 721.

Same; purpose of claim for refund.—The object and purpose of a claim for refund are to put the Commissioner on notice that the taxpayer believes the tax has been overpaid, so that proper correction may be made, and a document relied upon to constitute an informal claim for refund must be sufficiently definite to be regarded as an assertion by the taxpayer that he believes the tax has been overpaid.

The Reporter's statement of the case:

Mr. John P. Lipscomb, Jr., for plaintiff.

Mr. Ellsworth C. Alvord and *Mr. Floyd F. Toomey* were on brief.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.

Mr. Robert N. Anderson and *Mr. Fred K. Dyar* were on brief.

Plaintiff seeks to recover $3,624.03, with interest, an admitted overpayment of income tax for 1936. Refund was denied on the ground that the claim for refund of January 8, 1941, was not filed in time. Plaintiff contends that a timely informal claim was filed in the form of amended depreciation schedules in October 1939, which was perfected by the formal claim.

The court made special findings of fact as follows:

1. Plaintiff, a Delaware corporation with principal place of business at Pensacola, Florida, filed its income tax return

for 1936 on March 15, 1937. This return showed a tax of $101,002.25 which was paid during 1937 in four installments of $25,250.57 on March 16, and $25,250.56 each on June 16, September 17, and December 17. In this return a deduction of $169,305.65 was claimed for depreciation of plants and equipment. Plaintiff employed the accrual method of accounting.

The statutory periods of limitation for making a refund for 1936 without a claim and for the filing of a claim for refund were three years from the date the return was filed or two years from the date of payment of the tax to be refunded.

2. In June 1939 a revenue agent of the Bureau of Internal Revenue came to the office of plaintiff and began an examination and audit of its 1936, 1937, and 1938 returns. In the course of that examination and audit the agent requested plaintiff to furnish depreciation schedules in conformity with Treasury Decision 4422 to support the deductions for depreciation claimed in its 1936 and 1937 returns. The agent also asked that the schedules be reconciled with the property and depreciation accounts of the plaintiff's general ledger and that they reflect prior depreciation adjustments that had been agreed to between the Bureau of Internal Revenue and the plaintiff for its 1935 tax year.

3. Pursuant to and in accordance with this request and in October 1939, plaintiff filed with the examining revenue agent the detailed schedules requested by him. These schedules were prepared to set out in detail the asset accounts of the taxpayer on which it was claiming depreciation, as well as setting out the depreciation accounts in detail and including adjustments to reconcile the 1936 depreciation accounts with the adjusted accounts of 1935. In these schedules plaintiff claimed that the deduction for depreciation taken in its return for 1936 had been understated in the amount of $13,332.61, as shown by the summary sheet attached to the detailed schedules as follows:

	Year 1936	Year 1937
DeQuincy, Louisiana, per schedules	$66,365.35	$72,669.04
Bay Minette, Alabama, per schedules	10,541.47	14,943.13
Pensacola, Florida, per schedules	92,400.69	106,929.08
	169,307.51	194,541.25
Per Returns filed	169,305.65	194,541.20
Add—		
Additional depreciation claimed per Exhibits P and B—		
Pensacola Exhibit P	9,045.21	5,525.44
Bay Minette Exhibit B	4,287.40	4,265.40
Depreciation Claimed	182,638.26	204,332.04

At the time these schedules (plaintiff's exhibit 1) were prepared and furnished to the revenue agent, plaintiff did not claim any repayment of any portion of the 1936 tax and plaintiff did not know at that time whether an overassessment or deficiency would develop from the audit of plaintiff's 1936 return on the basis of the depreciation schedules furnished and the audit of the return and books then being made.

4. February 1, 1940, plaintiff, at the request of the revenue agent, filed with him an executed waiver on Form 872, extending until June 30, 1941, the statute of limitations for assessing any additional taxes against the plaintiff that might be determined to be due for 1936.

In February 1940 the examining agent, while engaged in his examination and audit, anticipated an additional tax for 1936 of approximately $5,000, and so advised plaintiff. Plaintiff entered in the reserve accounts of its books for 1936 the amount of additional taxes estimated by the agent at that time.

5. The examinations and audits of the 1936, 1937, and 1938 returns were prolonged from the summer of 1939 until June 14, 1940. This was occasioned by frequent interruptions of the examining agent's work by his superior in assigning him to other special work during that period. On June 14, 1940, the agent completed his examination and audit of plaintiff's returns for the three years, including a recomputation of the depreciation allowable for 1936 and 1937 on the basis of the detailed schedules furnished him by plaintiff.

The audit report prepared by the agent was dated June 14, 1940, and disclosed an overassessment in plaintiff's income tax of $4,359.23 for 1936, and in income and excess profits taxes of $4,414.22 for 1937. On that date plaintiff accepted in writing the proposed overassessments for 1936 and 1937 on the printed form (873) of the Bureau of Internal Revenue supplied by the examining agent. Plaintiff's first intimation of the determination of an overassessment for 1936 was on June 14, 1940, when the examining agent advised plaintiff that his report so indicated.

A copy of the agent's report (plaintiff's exhibit 3) was sent by the office of the revenue agent in charge at Jacksonville, Florida, to the plaintiff on July 25, 1940.

6. Of the overassessment for 1936 of $4,359.23 shown in the agent's report, $3,624.03 results from an increase in the deduction for depreciation claimed by plaintiff in its 1936 return to $183,368.30, or an increase of $14,062.65 over the deduction claimed in the return and an increase of $730.04 over the deduction claimed by plaintiff in the schedules referred to in finding 3.

7. In October 1940 the Commissioner of Internal Revenue audited and approved as correct the depreciation determination of the examining revenue agent for 1936 but refused to allow the resulting overassessment for 1936 on the ground that allowance was barred by the applicable statute of limitations.

The overpayment of $4,414.22 for 1937 was approved by the Commissioner of Internal Revenue and since it was not barred the amount thereof was refunded in October 1940.

8. December 10, 1940, the Internal Revenue Agent in Charge at Jacksonville, Florida, wrote to plaintiff as follows with respect to the 1936 overassessment:

> In reference to report covering investigation of your income tax returns for the years 1936 and 1937, which reflected an overassessment of $4,359.23 for the year 1936, and $4,124.22 for the year 1937, you are advised that the overassessment for the year 1936 is barred by the statute of limitations.
>
> Section 322 (b) of the Revenue Act of 1936 reads as follows:
>
> "Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return

was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made at the expiration of whichever of such periods expires the later."

9. January 8, 1941, plaintiff filed under oath on Treasury Form 843 with the Collector for the District of Florida a formal claim for refund in the amount of $3,624.03 for the year 1936. The grounds relied upon by the plaintiff in support of the claim for refund were stated therein as follows:

Revenue Agent's report, dated June 14, 1940, revealed an overassessment in the amount of $4,359.23, of which $3,624.03 was due to the Commissioner's allowance of additional depreciation in the amount of $14,062.65. The taxpayer accepted the overassessment as correct under date of June 14, 1940.

During the month of October, 1939, at the request of the Revenue Agent, who was about to make the audit, taxpayer furnished said Agent with a detailed depreciation schedule which indicated that the taxpayer had understated depreciation on its return in the amount of $13,332.61, and claim was made in said schedule for additional depreciation in that amount.

Reference is hereby made to the above-mentioned Revenue Agent's Report and to the taxpayer's depreciation schedule, in which allowance of additional depreciation was duly claimed, with the same force and effect as though herein set forth in full.

This formal claim is filed to support and perfect the informal claim made on the same grounds in the above-mentioned depreciation schedule filed with the Revenue Agent.

10. By a registered letter of April 3, 1941, the Commissioner disallowed the claim for refund filed January 8, 1941, on the ground that it had been filed after expiration of the statutory limitation period provided by sec. 322 (b) of the Revenue Act of 1936.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

On the facts we are of opinion that the depreciation schedules prepared by plaintiff did not constitute an in-

formal claim for refund filed within three years from the time the return was filed on March 15, 1937, or within two years from the last payment on the 1936 tax on December 17, 1937. Moreover, if it could be assumed that the depreciation schedules prepared in October 1939 for the revenue agent for use in connection with his audit amounted to an informal claim for refund, such claim had been rejected as insufficient by the Commissioner in October 1940 when he refused to make a refund for 1936, and plaintiff had been notified on December 10, 1940, by the agent in charge that any refund for 1936 was barred before plaintiff undertook by a formal claim of January 8, 1941, to amend or perfect this alleged informal claim. A refund claim, informal or formal, cannot be amended or perfected as a matter of right after it has been denied or rejected, and after the period of limitation has expired. *Sugar Land Railway Company* v. *United States*, 71 C. Cls. 628, 635; *Cuban-American Sugar Company* v. *United States*, 89 C. Cls. 215, 225. Cf. *B. Altman & Company* v. *United States*, 69 C. Cls. 721.

We cannot say that the preparation of the depreciation schedules requested by the agent was considered or intended by plaintiff at the time as a claim for refund. The evidence indicates that it did not regard these schedules as an informal claim for refund until after the statute of limitations had run. At that time, October 1939, plaintiff did not know whether an overassessment or a deficiency would result for 1936 from the audit and the depreciation schedules furnished. If plaintiff had believed at that time that it had made an overpayment on the basis of the additional depreciation shown on the schedules it could and probably would have asserted its right to a refund, either in such schedules or separately. Subsequently in February 1940 plaintiff signed a waiver of the statute of limitation on assessment of any deficiency that might be found to be due, and again did not assert an overpayment. Also, in February, plaintiff instead of asserting that the tax had been overpaid added $5,000 to its reserve for taxes in anticipation of an additional assessment for 1936. Since the object and purpose of a claim for refund are to put the Commissioner on notice that it is believed by the taxpayer that the tax has

been overpaid, so as to enable him to correct errors made by the taxpayer in the return, or by him in his audit thereof, a document relied upon to constitute an informal claim for refund must at least contain a statement that is sufficient to be regarded as an assertion by the taxpayer that he believes the tax has been overpaid. We think the documents relied upon did not meet this test.

The facts show that the first intimation plaintiff had that its tax for 1936 had probably been overpaid was on June 14, 1940, when the revenue agent requested it to sign Form 873 accepting the proposed overassessments as shown in his audit report for 1936 and 1937 (finding 6). At that time the statute of limitation on a refund of three years from the filing of the return and two years from the date of the last payment had run (49 Stat. 1648, 1731).

We do not think in the circumstances that the depreciation schedules prepared in October 1939 amounted to an informal claim for refund. Plaintiff is therefore not entitled to recover, and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

SANDOR S. HIRSCH AND PERNICE CONTRACTING CORPORATION *v.* THE UNITED STATES

[No. 45853. Decided May 7, 1945]

On the Proofs

Government contract; preparation of airway site; excess costs over and above bid price.—Where plaintiffs entered into a contract with the Government for the excavation, grading and drainage for airport runways and appurtenant structures, at a unit price per acre for the preparation of the site, in response to an invitation for bids in which there was stated only an approximation of the number of acres to be cleared and in which prospective bidders were invited to visit and inspect the site; and where the contractor was required to clear all land necessary to be cleared, "whether the quantities be more or less than the amount stated";

and where plaintiffs have been paid, at the unit price, for the number of acres actually cleared; it is *held* that plaintiffs are not entitled to recover for the excess costs incurred over and above the bid price per acre.

The Reporter's statement of the case:

Mr. Albert L. Wigor for the plaintiffs. *Messrs. George W. Newgass* and *Newgass & Nayfack* were on the brief.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Julian R. Wilheim* was on the brief.

The court made special findings of fact as follows:

1. Plaintiffs, Sandor S. Hirsch, an individual, and Pernice Contracting Corporation, a corporation, are joint contractors having their place of business in New York City.

2. March 27, 1941, defendant advertised for bids which were to be opened April 17, 1941, for furnishing all plant, labor, and materials, and performing all work of excavation, grading, and drainage for airport runways at the West Lebanon Airport located at West Lebanon, New Hampshire, in accordance with the specifications, bidding schedule, and drawings referred to in the Invitation for Bids.

The Invitation for Bids contained among others the following provisions:

> VIII. BID AND CONTRACT.—*a*. Bids must be submitted upon the Standard Government Form of Bid and the successful bidder will be required to execute the Standard Government Form of Contract for construction. The bid form has an entry for each item on which estimates will be given or payments made, and no other allowances of any kind will be made unless specifically provided for in the specifications or the contract, or adjustments under Article 3 of the contract. A bid for the entire work must have each blank filled.
>
> *b*. The quantities of each item of the bid, as finally ascertained at the close of the contract, in the units given and the unit prices of the several items stated by the bidder, in the accepted bid, will determine the total payments to accrue under the contract. The unit price bid for each item must allow for all collateral or indirect cost connected with it.
>
> * * * * *

XV. INVESTIGATION OF CONDITIONS.—Samples of borings and from test pits taken at the site of the work can be seen at the U. S. Engineer Laboratory at Providence, Rhode Island, where they should be inspected by prospective bidders. Bidders are expected to visit the locality of the work and acquaint themselves with all available information concerning the nature of the materials to be excavated from the borrow or structure excavations, and the local conditions bearing on transportation, handling and storage of materials. They are also expected to make their own estimates of the facilities needed, and difficulties attending the execution of the proposed contract, including local conditions, availability of labor, uncertainties of weather, and other contingencies. In no event will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site. At the bidder's request, a representative of the Government will point out the site of the proposed operations. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder from responsibility for estimating the difficulties and costs of successfully performing the complete work.

3. Pursuant to the Invitation for Bids, plaintiffs duly submitted a bid for carrying out the work on the basis of which a contract was entered into between plaintiffs and defendant on April 28, 1941, a statement of the work to be performed being set out in the contract as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for excavation, grading and drainage for airport runways and appurtenant structures, complete, consisting principally of the major items of construction listed in paragraphs 1–02 and 1–03 of the specifications, as revised by Addendum No. 1; consisting of the approximate quantities of material and work listed on the attached Schedule I, for the consideration of the unit prices stated on the attached Schedule I, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications, Invitation No. 699–41–203, dated U. S. Engineer Office, Providence, Rhode Island, March 27, 1941, Addendum No. 1 thereto, dated April 9, 1941, drawings listed in paragraph 1–04 of the specifications,

as revised by Addendum No. 1, Schedule I, showing approximate quantities and unit prices on page (2a) hereof.

The specifications which were made a part of the contract contained the following provisions with respect to work to be done:

1–02. * * *

b. The work to be done consists of furnishing all plant, labor, and materials, and performing all work required for excavation, grading, and drainage required for airport runways and appurtenant structures, complete in accordance with these specifications and the drawings forming a part hereof, together with such incidental work at the site as may be required for completion of the work within the intent and scope of the specifications, or as may be ordered in writing by the contracting officer. It will consist of the following major items:

(1) Grading for two landing strips totaling 7,500 feet in length, and excavation for approach zones.

(2) Construction of the gravel base course for runway pavement, gravel shoulders for runways, and parking areas.

(3) Construction of the drainage system.

(4) Sodding and seeding landing strip areas adjacent to runways.

* * * * * *

d. The funds available for payments to the contractor are limited. The right is reserved to increase or decrease the work a maximum of 25 percent as the interests of the Government may require.

The specifications further provided as follows:

1–04. * * *

b. The work shall also conform to such other drawings relating thereto as may be exhibited in the office of the contracting officer prior to the opening of proposals, and to such drawings used in explanation of details as may be required from time to time during construction, including such minor modifications as the contracting officer may consider necessary on account of conditions discovered during the prosecution of the work.

c. Prior to performing the work, the contractor shall check all drawings and shall immediately report to the contracting officer any errors or omissions discovered therein. Quantities stated in bills of material on con-

tract drawings are approximate, and the contractor shall furnish the required quantity without change in contract price. All items to be furnished and required to complete the work within the scope of the contract shall be provided by the contractor, complete and in good working order, regardless of whether or not they are fully shown or listed on the contract drawings. Parts and details not fully indicated on the drawings shall be detailed by the contractor in accordance with standard engineering practice. * * *

4. Schedule I referred to in the quotation from the contract appearing in finding 3 set out the twenty-two items to be performed under the contract. The specifications contained the following provisions with respect to "quantities":

> 1-05. *Quantities.*—The following estimate of quantities is given only to serve as a basis for the comparison of bids and for determining the approximate amount of the consideration of the contract. Within the limits of available funds, the contractor shall complete the work specified in Paragraph 1-02 hereof, whether the quantities be more or less than the amounts stated below.

Following the section quoted above were the designations of each of the twenty-two items to be performed under the contract and the estimated quantity for each item. Schedule I, referred to in the quotation from the contract appearing in finding 3, listed items and quantities of material referred to in the specifications and in addition set out therein the unit prices bid by plaintiffs as well as the total for each item and the total for all items as follows:

Contract No. CCA4565
(W-699-eng-1447)
Dated: April 28, 1941

SCHEDULE I

Item No.	Designation	Unit	Quantity	Unit price	Total
1	Preparation of Site	Acre	75	$100.00	$7,500.00
2	Common Excavation—General	Cubic yard	446,000	.17	75,820.00
3	Common Excavation—Trench	Cubic yard	7,400	.75	5,550.00
4	Common Excavation—Borrow Area.	Cubic yard	1,000	.42	420.00
5	Rock Excavation	Cubic yard	100	7.00	700.00
6	Embankment	Cubic yard	447,600	.04	17,904.00

SCHEDULE I—Continued

Item No.	Designation	Unit	Quantity	Unit price	Total
7	Compacted Backfill	Cubic yard	1,350	$0.40	$540.00
8	Gravel, Screened	Cubic yard	5,300	1.75	9,275.00
9	Gravel, Pit Run	Cubic yard	39,000	.43	16,770.00
10	Grouted Stone Gutters	Square yard	340	4.30	1,462.00
11	Vitrified Clay Pipe—8 inch	Linear foot	8,540	.38	3,245.20
12	Vitrified Clay Pipe—10 inch	Linear foot	4,120	.55	2,266.00
13	Vitrified Clay Pipe—12 inch	Linear foot	3,360	.70	2,352.00
14	Vitrified Clay Pipe—15 inch	Linear foot	1,910	1.00	1,910.00
15	Vitrified Clay Pipe—21 inch	Linear foot	200	2.00	400.00
16	48-inch Reinforced Concrete Pipe	Linear foot	620	18.00	11,160.00
17	Concrete	Cubic yard	75	20.00	1,500.00
18	Topsoil	Cubic yard	31,000	.25	7,750.00
19	Sodding and Seeding	Acre	57	220.00	12,540.00
20	Manhole Brickwork	M brick	49	50.00	2,450.00
21	Miscellaneous Iron and Steel	Pound	17,900	.06	1,074.00
22	Electrical Ducts	Linear foot	1,350	.50	675.00
	Total				183,263.20

Fifteen bids were received by defendant for the contract, each of which submitted unit prices for the several items shown in the schedule set out above. On Item 1, Preparation of Site, two of the bids submitted were lower unit prices than the plaintiffs' unit price of $100, namely, $50 and $75, and the other prices on this item ranged from $112 to $400 per acre. The average unit price of all bids on this item, exclusive of plaintiffs' bid, was $204.07 per acre.

5. The specifications also provided—

> 1-06. *Physical data.—a. General.*—The contract drawings represent all the pertinent information and records which the Government has available for work at the site. Concrete aggregates and gravel or crushed stone for fills shall be obtained from sources approved by the contracting officer. It is expressly understood that the Government will not be responsible for any deduction, interpretation, or conclusions made by the contractor from his inspection of the available drawings and records.
>
> * * * * *
>
> 1-23. *Interpretation of specifications.*—The contracting officer shall decide all questions which may arise as to the performance, quantity, quality, acceptability, fitness, and rate of progress of the several kinds of work to be done or materials to be furnished under

this contract. He shall decide all questions which may arise as to the interpretation of the specifications and of drawings used and as to the fulfillment of this contract on the part of the contractor, and as to defects in the contractor's work. His determination and decision shall be final, subject to appeal as provided for in Article 15 of the contract.

* * * * *

1–32. *Claims, protests, and appeals.—a.* If the contractor considers any work demanded of him to be outside the requirements of the contract, or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall, without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Chief of Engineers, whose decision shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions or decisions of the contracting officer shall be final and conclusive.

Article 15 referred to in paragraph 1–23 above read as follows:

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

6. The specifications contained the following provisions with respect to "Preparation of Site":

SECTION II. PREPARATION OF SITE (Item 1).
2–01. *Work included.*—Clearing, grubbing, and disposal of materials shall be done as directed by the

contracting officer, within the limits shown on the drawings or as staked in the field.

2–02. *Clearing.—a.* Clearing shall include all necessary portions of the following areas: (1) The area within the limits of the general grading and other excavation work required for runways, landing-strips and adjacent strips required for runways, landing-strips and (2) borrow areas, and (3) portions of any other area designated by the contracting officer within the limits shown on the drawings.

* * * * *

2–06. *Measurement and payment.*—The quantity to be paid for under Item 1 will be the number of acres prepared as specified above and directed by the contracting officer. Payment for all work in connection with the preparation of the site as above specified, including the loading, hauling, and disposal of the materials, will be made at the contract unit price for Item 1, "Preparation of Site."

7. Notice to proceed was received by plaintiffs May 3, 1941, and work was thereupon commenced. Plaintiffs duly performed all the work required under the contract and defendant accepted the work June 24, 1942. As shown in finding 4, the total contract price based on specification estimates of quantities and unit prices bid by plaintiffs was $183,263.20. Pursuant to change orders accepted by plaintiffs and supplemental agreements duly entered into the contract price was increased in the amount of $199,044.79, and further amounts in the total sum of $44,969.77 were paid on account of overruns in various items without the issuance of change orders or supplemental agreements, making the final contract price as paid upon completion of the contract $427,277.76.

8. August 8, 1941, plaintiffs advised the contracting officer that the number of acres set out under Item No. 1, "Preparation of Site", and in paragraph 1–05 of the specifications in the amount of 75 was not a correct estimate of the number to be cleared, and that they now estimated the correct number of acres for this item was approximately 240, and that their estimated cost (including overhead and profit) amounted to $302 per acre. Plaintiffs requested that pay-

ment be made for the acreage over and above the 75 acres shown in the specifications at $302 per acre instead of at $100 per acre as shown in their bid and in the contract.

9. The site of the airport on which the work was to be performed was on the top of a hill and consisted of wooded, arable and pasture land. The area of the site was somewhat in excess of 200 acres, which acreage could be computed from the plans and specifications but, because of its nature as just described, all of it did not require clearing, and it was not possible to compute from the drawings and specifications the acreage to be cleared. However, by using the drawings and specifications and making a personal inspection of the site the acreage to be cleared could have been computed within a reasonable approximation of the acreage ultimately agreed upon as cleared by plaintiffs. Plaintiffs' representatives visited the site in the early part of April 1941, prior to the submission of their bid, but did not attempt to determine the area to be cleared by personal investigation. At the time of their visit such snow as was on the ground would not have prevented a reasonable determination of the area to be cleared. Plaintiffs' employee who computed the quantities for plaintiffs' bid estimated that approximately 70 acres would be required to be cleared and at that time realized that additional acreage must be cleared under the contract, but proceeded on the theory that the clearing of the additional amount would be of such a minor nature that no payment would be made therefor.

The item "Preparation of Site" was a minor item, both as to money involved and work required, as compared with other items in the contract, and it was not important from the standpoint of the Government to determine accurately the quantity involved for bid purposes.

10. September 15, 1941, the contracting officer denied plaintiffs' claim for the increase in price on the ground that the contract made it obligatory for the contractor to prepare the site at the unit price of $100 per acre whether the quantities were more or less than the estimated quantities shown in the specifications.

11. September 29, 1941, plaintiffs appealed to the Chief of Engineers from the denial of their claim by the contracting officer and therein made claim for the sum of $41,225.82 which represented the alleged preparation of 129 acres over and above the 75-acre quantity at an alleged cost plus profit of $319.58 per acre. The appeal was thereafter amended, reducing the amount claimed to $24,757.38. While the original appeal was pending, a conference was held by the contracting officer with plaintiffs' representatives on or about October 22, 1941, in regard to the subject matter of the appeal. At that time such other matters as had been in dispute under the contract had been settled and there remained for determination the exact amount which had been cleared by plaintiffs and the price which would be paid therefor. The contracting officer originally took the position that the total acreage which had been cleared for which payment could be made under Item 1 of the contract was 105 acres, whereas plaintiffs were claiming in excess of 200 acres. The topography of the area and character of vegetation thereon, including trees and shrubbery, and the nature of the work required were such that reasonable persons might differ on the exact number of acres to be cleared which would be classified for payment under the item "Preparation of Site". At the conference it was agreed that a survey would be made for the purpose of determining the exact quantity. Pursuant to that agreement a survey was made and an agreement reached that the quantity cleared for which payment was to be made was 147.2 acres, that is, 72.2 acres in excess of the estimated quantity shown in the specifications.

In the findings of fact made by the contracting officer and submitted to the Chief of Engineers, the following finding is made with respect to the agreement reached at the conference referred to above and the evidence does not support a finding to the contrary:

> 8. On or about October 22, 1941, an agreement was arrived at between the contractor and this office, stipulating that 147.20 acres were actually prepared at the site in accordance with Item 1. It was tacitly understood that payment for the stipulated 147.20 acres would be made at the contract unit price.

12. On appeal the Chief of Engineers denied plaintiffs' claim, his letter of October 26, 1942, to that effect concluding with the following statement:

> Accordingly, I find no basis for your contention that under the terms of the contract you were obligated to clear and prepare only 75 acres. On the contrary, in view of the specific provisions contained in Paragraph 2–06 of Section II of the contract specifications, it is my finding that under the terms of your contract the unit price of $100.00 per acre is the proper amount payable for all site preparation.

13. Plaintiffs were paid at the unit price of $100 for the acreage agreed upon, 147.2 acres, which included the estimated quantity set out in the specifications, 75 acres, plus the excess quantity of 72.2 acres. The cost to plaintiffs, exclusive of any allowance for overhead or profit, for clearing the 147.2 acres was $21,474.83, that is, an average cost of $145.888 per acre. The total cost of clearing 72.2 acres, exclusive of overhead or profit, was $10,533.11. The excess of this latter amount over the amount paid plaintiffs for clearing the 72.2 acres at $100 per acre is $3,313.11.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On April 28, 1941, the plaintiffs entered into a contract with the defendant for the excavation, grading and drainage for airport runways and appurtenant structures at West Lebanon, New Hampshire. Included in the work to be done was the necessary preparation of the site. Plaintiffs and all other bidders bid separately on the various things to be done. For the preparation of the site the plaintiffs bid a unit price of $100.00 an acre. The Government estimated that it would be necessary to clear 75 acres. It turned out that it was necessary to clear 147.2 acres. Plaintiffs have been paid for the excess acreage over that estimated at the unit price, but claim the right to be paid for the excess on the basis of actual cost. That actual cost was $145.888 per acre, plus overhead and profit.

The work of preparing the site was a very small part of the total work to be done. On the basis of the number of acres which it was estimated it would be necessary to clear, plaintiffs' bid was $7,500, whereas, the total contract price was $183,263.20.

The specifications, upon the basis of which plaintiffs' bid was submitted, provided as to quantities of work to be done—

> The following estimate of quantities is given only to serve as a basis for the comparison of bids and for determining the approximate amount of the consideration of the contract. Within the limits of available funds, the contractor shall complete the work specified in Paragraph 1–02 hereof, whether the quantities be more or less than the amounts stated below.

Then followed the 22 items of work to be performed, including that of preparation of site.

It was not possible to determine from the drawings and specifications the number of acres to be cleared. The site consisted of wooded lands, arable lands, and pasture lands on the top of a hill. The amount necessary to be cleared could not be determined without an inspection of the site itself. Such an inspection bidders were required to make by paragraph 15 of the invitation for bids. Plaintiffs made an inspection of the site, but during this inspection did not attempt to determine the amount of the acreage necessary to be cleared.

That the quantities stated were mere approximations was made clear by the specifications attached to the invitation for bids. "The estimate of quantities is given *only* to serve as a basis for the comparison of bids and for determining the approximate amount of the consideration of the contract." [Italics ours.] And it was plainly stated that "the contractor shall complete the work specified in Paragraph 1–02 hereof, *whether the quantities be more or less than the amounts stated below.*" [Italics ours.] This, together with the requirement that plaintiffs should visit the site, put all bidders on notice that they had to make their own estimates of the number of acres to be cleared.

Paragraph 2–06 clearly states that payment for whatever number of acres were actually cleared should be made "at the

contract unit price for Item 1 'Preparation of Site.'" This reads:

> The quantity to be paid for under Item 1 [which was the item for preparation of the site] will be the number of acres prepared as specified above and directed by the contracting officer. Payment for all work in connection with the preparation of the site as above specified, including the loading, hauling, and disposal of the materials, will be made at the contract unit price for Item 1, "Preparation of Site."

Under the contract plaintiffs were required to clear whatever number of acres it was necessary to clear, and under it they were to be paid therefor the unit price bid by them.

We are of the opinion that plaintiffs are not entitled to recover. *Brawley* v. *United States*, 96 U. S. 168; *Morris & Cumings Dredging Co.* v. *United States*, 78 C. Cls. 511; *Brock, et al.* v. *United States*, 84 C. Cls. 453; *Clarke Bros. Construction Co.* v. *United States*, No. 45096, decided January 8, 1945 (103 C. Cls. 57).

Apparently, plaintiffs' bid for the clearing of the site was too low. The average of all other bids for this work was a little over $204.00 an acre. Plaintiffs bid $100.00 and it actually cost them a little over $145.00, exclusive of overhead and profit. But defendant had the right to demand that plaintiffs do the necessary work at the price bid by them. It required no more of plaintiffs than it had a right to require under the contract and that plaintiffs had reason to believe would be required.

Plaintiffs are not entitled to recover. Their petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION v. THE UNITED STATES

[No. 43814. Decided May 7, 1945]

On the Proofs

Government contract for hospital buildings; extra work; counterclaim.—Where plaintiff contracted with the Government to erect nine buildings of a hospital; and where plaintiff presented claims for the furnishing and installing of extra steel dressers or cabinets, for the repairing of cracks in corridor walls, the furnishing of wooden blocks behind metal window trim, the installation of hollow metal frames and for an alleged shortage in payment on an order for additional sewer connections; it is *held* that plaintiff is not entitled to recover except for the cost of repairing cracks.

Same; faulty design; breach of contract.—Where it is found that the cracks developed as a direct result of the defendant's faulty design; and where the defendant supervised the original work; it is *held* that its refusal to accept the work was a breach of the contract, entitling plaintiff to recovery of damages. The other items were within the contract scope or were paid for by defendant.

Same; counterclaim for taxes.—On defendant's counterclaim for capital stock, income and excess profits taxes, which was not resisted, it is *held* that defendant is entitled to recover.

The Reporter's statement of the case:

Mr. Norman B. Frost for the plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Joseph A. Holpuch Company, plaintiff herein, is a corporation of the State of Illinois chartered to engage in the general building construction business.

2. December 9, 1931, the plaintiff entered into a written contract with the defendant, represented by William D. Mitchell, Attorney General, head of the Department of Justice, as contracting officer, whereby for the consideration of $1,710,000 the plaintiff agreed to furnish all labor and materials, and perform all work required for the construction of nine buildings of the Hospital for Defective Delin-

quents at Springfield, Missouri, including the preparation of the site, construction and completion of foundations, mechanical equipment and the covered connecting corridors and tunnels and underground pipe tunnel (including alternates not here involved), all in accordance with specifications and drawings identified and made part of the contract.

Copy of the contract and its specifications is filed in evidence and made part hereof by reference.

Article 18 of the contract provided:

> (a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.
>
> (b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

The contract further specially provided:

> The "architects" referred to in paragraph 1A of the specification hereinbefore mentioned shall act as the duly authorized representative of the contracting officer in so far as said Architects' services are provided for in their contract with the Treasury Department dated July 11, 1931.

The contract of July 11, 1931, is not in evidence.

Paragraph 1 A of the specifications, thus referred to, provided:

> Where the term "Architect" or "Architects" is employed, it shall refer to Joannes and Marlow, Architects, 420 Lexington Avenue, New York, New York, and said term shall also include their authorized representatives.

Article 30 of the specifications is as follows:

> *Interpretations.*—The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final. The Architect is the duly authorized representative of the contracting officer.

Articles 2, 3, 5, 7 and 15 of the contract provided:

> ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and

specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 7. *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any par-

ticular standard, the contracting officer shall decide the question of equality. * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Work under the contract was entirely sublet by the plaintiff, and the plaintiff sublet the work by the paragraphs in the specifications.

3. *Exterior stone,* $47,666.88.

The following articles were included in the specifications under the heading of "Stone Work":

333. *Work included.*—The work included under this heading shall consist of all labor, materials, and appliances required for the supply, execution, and completion, of all granite and other cut stone work for the exterior of all the buildings, connecting corridors, adjuncts, and appurtenances thereto as shown or specified, namely:

"Granite base courses.

"Slip sills for doors and basement windows where such are shown as granite.

"Granite facing and coping to bus entry retaining walls.

"Granite steps—and/or ashlar about same.

"Limestone sills for doors and windows and steps.

"Limestone arches—keystones or skewbacks.

"Limestone jambs and trim about exterior openings whether this be plain, moulded or enriched.

"Limestone cornices, string cornices, mouldings, etc.

"Limestone ashlar facing as shown on drawings.

"Other work shown on the drawings or which would reasonably be required to make a complete and finished work."

334. *General.*—The work [sic] "Stone" as used herein shall apply to all exterior granite, stone and/or marble, as may be noted on the drawings or named in the specification. All stone of its kind and color shall be obtained from one quarry.

336. *Kinds of stone.*—The naming of any stone on the drawings and in the specification is for the purpose of indicating the type of stone that is required, but it is not intended to exclude any stone which corresponds in quality, color, form of marking and texture to those named. Full consideration, will, therefore, be given to stones from quarries selected by the contractor, provided they meet with the above requirements.

338. All exterior stone above the granite base as shown on the drawings shall be select grade, light gray, Logan gray stone as produced by the Logan Gray Quarries, or Phenix Stone as produced by the Phenix Marble Company, 609 Scarrett Building, Kansas City, Mo., or Carthage Marble or equal, eliminating the very dark shades and the coarse or honeycomb formation.

343. Stone shall be set on its natural bed with strata horizontal.

353. * * * Exterior stone above the foundation plinth shall be sand rubbed (wet process) for all wash surfaces. All other surfaces shall be rough sawn, machine dressed, free from tool marks or other imperfections.

In estimating for its bid the plaintiff planned on using limestone for the exterior of the buildings, except for steps where marble was concededly required, and granite for the water table.

The plans and drawings specifically designate "limestone" for the exterior stone, except for steps and water table, and the plaintiff interpreted the specifications as requiring limestone for the exterior and marble for the interior finish.

Before either marble or limestone was erected a dispute arose between the parties to the contract as to the stone to be used for the exterior.

The plaintiff proposed to use limestone. The architects represented to the plaintiff that it was the purpose and intent of those who were backing the project, especially labor, commercial and political interests in the neighborhood thereof, that Missouri labor and materials were to be used and employed.

The specifications were drawn by the defendant, and Article 338 thereof, above quoted, was drafted in an attempt to carry out the purpose and intent of using Missouri labor

and materials. The quarries mentioned were all in the State of Missouri.

The Logan Gray quarries and the Phenix Marble Company's quarries, all located in Missouri, were either not operating, or with insufficient capacity or equipment to handle an order for exterior stone the size the project here required. This left to the plaintiff only the use of Carthage marble or its equal, if limestone was not to be used.

The architects ruled that Carthage marble was limestone, that plaintiff must use Carthage marble or its equal, and that the term "Carthage Marble" as used in the specifications was an erroneous description, that the term "Carthage limestone" should have been used instead. The contracting officer did not correct the specifications in this respect.

Marble and limestone are distinct stones. Limestone is sedimentary, comparatively light in weight, and will not take a polish. Marble is metamorphic, comparatively heavy in weight, and takes a polish.

For exterior use as here employed limestone is the equal of Carthage marble. Limestone is not marble and where marble is specified limestone does not fit the specification.

"Carthage marble," at the times here involved, was known in the trade as "marble," so represented by its producers, and so handled on the market. The designation of stone from Missouri quarries in Article 338 of the specifications was intended by the defendant to require the use of marble from Missouri and to exclude the use of limestone.

The plaintiff, acceding to the demands of the Architects under protest, began the installation of Carthage marble for the exterior of the buildings and in the course of installation defendant's inspector rejected a substantial amount of the marble as not fulfilling the requirement that the marble be set on its natural bed and without exposure of undesirable seams. The seams were too close together in Carthage marble to allow a setting on the natural bed without such exposure, and the defendant finally allowed the marble to be set on its edge, thus doing away with unsightly exposure of seams. Limestone could have been laid on its natural bed without the exposure of such seams.

Marble was concededly required by the plans and specifications for interior use, and marble from the same quarry was used by the plaintiff for exterior and interior use. In general, the marble installed on the exterior was unpolished and the marble installed in the interior polished.

The designation of limestone on the plans and drawings and its designation in Article 333 of the specifications were not given effect by the architects.

On March 14, 1932, the architects ruled upon the question of the exterior stone to be used, in letter to the plaintiff as follows:

> Mr. Bennett has sent us a copy of your letter to him of March 10th regarding the stone to be used for exterior stone work.
>
> The specifications read as follows:—
>
> PARAGRAPH 338.—"All exterior stone above the granite base as shown on the drawings shall be select grade, light gray, Logan gray stone as produced by the Logan Gray Quarries, or Phenix Stone as produced by the Phenix Marble Co., 609 Scarrett Building, Kansas City, Mo., or Carthage Marble or equal, eliminating the very dark shades and the coarse or honeycomb formation."
>
> PARAGRAPH 336.—"KINDS OF STONE.—The naming of any stone on the drawings and in the specification is for the purpose of indicating the type of stone that is required, but it is not intended to exclude any stone which corresponds in quality, color, form of marking and texture to those named. Full consideration, will, therefore, be given to stones from quarries selected by the contractor, provided they meet with the above requirements."
>
> The question of the admissibility of Indiana Limestone was brought to our attention sometime ago. At that time we referred the question to the office of the Supervising Architect and were informed as follows:—
>
> "Any bidder reading these paragraphs carefully should not be in doubt of the character of stone required by the specifications and it is the opinion of this office that Indiana Limestone has not the characteristics of the stones named."
>
> This opinion is in accord with our interpretation of the specifications.
>
> We would suggest that if you have other stones in mind that have the characteristics of the stones named in the specifications, you forward samples so that we can refer them to the office of the Supervising Architect and the Department of Justice.

The cost of installing marble for the exterior was greater than the cost of installing limestone therefor. There is no satisfactory proof of the extent of the excess cost.

4. *Plaster cracks*, $1,422.88.

This claim is withdrawn by the plaintiff.

5. *Steel dressers or cabinets*, $1,548.24.

Articles 1184 to 1190, inclusive, of the specifications, under the caption "Steel Shelving, Cabinets, Partitions & Counters," read:

> 1184. *Scope of work.*—Supply and set metal shelving where shown in Clothes Closets, Clean Clothes Closets, Linen Closets, Clean Clothes and Linen Closets.
>
> 1185. Shelving and counters in Pharmacy, Pathological Laboratory, Dental Laboratory.
>
> 1186. Shelving and meat hook racks in Refrigerators.
>
> 1186 A. Bins in Patients' Locker Rooms.
>
> 1187. Metal stall partitions and stall doors in Help's Toilets and elsewhere as noted on the drawings including hardware for same.
>
> 1188. Medicine cabinets wherever shown on drawings.
>
> 1189. Boxes and grilles for loud speakers wherever shown on drawings.
>
> 1190. All other shelving and equipment of this nature which is called for on drawings and details.

During the course of construction a controversy arose between the parties as to whether it was plaintiff's obligation under the contract to furnish and install steel dressers or cabinets in diet and service kitchens in buildings numbered 1, 2, 4 and 8. These articles are known in the trade indifferently as cabinets or dressers.

The plot plan, contract drawing JM–1, bears the note: "Buildings and other work shown dotted are not included in this contract."

The floor plans of these buildings show dressers or cabinets in these kitchens outlined in solid lines and not in dotted lines.

Contract drawing JM–205 purports to show the details of "metal shelving and cabinets." It shows the details of a steel cabinet, with the notation: "See plans for locations."

A fair reading of the plans and drawings necessarily leads to the conclusion that steel cabinets or dressers were to be

furnished and installed by the plaintiff in the kitchens in question.

In answer to a contention on plaintiff's part that the contractor was not required to furnish or install these dressers or cabinets the architects advised the plaintiff by letter December 8, 1932, as follows:

> Regarding dressers, item 5 generally shown on construction plans, the detail of these dressers is shown on JM-205 "Steel Cabinets" with a note "See Plans for locations." Specifications for "Steel Shelving, Cabinets, Partitions and Counters" Paragraph 1190 calls for "all other shelving and equipment of this nature which is called for on drawings and details." Paragraph 1202 applies particularly to dresser or steel cabinet construction.
>
> The absence of any inquiries from bidders regarding these dressers and detail of steel cabinets is evidence that the entire matter must have been understood and that these items were included in their bids. Whether your subcontractors included them or not does not relieve you of your responsibility in furnishing them.
>
> In order to make clear the extent of this work, we are enclosing two (2) blue prints of our drawing #221 dated December 8th, 1932, in this connection. In preparing this drawing, one change has been made in connection with dresser in Dishwashing Room #121, Building #4. This has been changed to open shelving.

The architects again advised the plaintiff regarding these dressers or cabinets January 5, 1933, as follows:

> Regarding dressers, under notes on drawing JM-1 "Buildings and other work shown dotted are not included in this contract." Equipment generally indicated on plans by the symbol number "5" are not shown dotted and are identified under notes on the various plans as "Dressers." Drawing JM-205 shows a ¾" scale detail of "Steel Cabinet" whose appearance is easily identified as a "Dresser." A note on this detail reads "See plans for locations." Paragraph 28 therefore requires the furnishing of these dressers even though they may not be mentioned in specification.
>
> Paragraph 1190 of the specification "Steel Shelving, Cabinets, Partitions and Counters" requires the furnishing of "all other shelving and equipment of this nature." Paragraphs 1198 to 1208 refer to the details of construction of these dressers.

> We expect you to furnish these dressers and await the submission of shop drawings. In this connection please note the reduction in length of dresser in dish washing room 121, Building #4 due to the installation of a new door to service passage 115.

On March 22, 1933, the architects transmitted to the plaintiff blueprints of drawings showing details of the disputed cabinets or dressers, not theretofore shown on drawing JM–205.

On March 25, 1933, the plaintiff advised the architects by letter as follows:

> Regarding your letter of March 22, 1933, with reference to dressers, and enclosure of three blue prints of drawing JM–221 dated revised March 22, 1933, it is our understanding of your letter that you are directing us to fabricate and install these dressers in accordance with the drawing JM–221 dated revised March 22, 1933.
>
> It is our intention to have these dressers fabricated and installed when job conditions permit, but with the distinct understanding that we are putting them in under protest and we expect to be compensated for same, as they are not a part of our contract.

The plaintiffs furnished and installed the dressers or cabinets as required by the architects, at a cost of $1,279.54. With overhead and profit, the cost is $1,548.24.

6. *Cracks in corridor walls*, $1,054.94.

The buildings under the plans were constructed with connecting corridors, Buildings Nos. 1, 2, 3 and 4 with their corridors forming an inclosed square, other buildings extending outwardly therefrom by other connecting corridors. The walls of the corridors were of brick with foundations of concrete. The longest of these corridors was some 240 feet. None of the corridors were provided with expansion joints except where they joined the building from or to which they led.

The walls and their foundations were constructed in accordance with contract requirements and under the constant inspection of defendant's officers.

Good planning would have dictated expansion joints every 50 or 60 feet, to take care of shrinkage and expansion that invariably takes place in concrete work.

Soon after the corridor walls were constructed numerous vertical cracks developed in them. Defendant's officers refused to accept the buildings in that condition and over plaintiff's protest and claim for remuneration required the cracks to be repaired. The plaintiff thereupon repaired the cracks, at a cost of $1,054.94, including overhead and profit.

March 10, 1933, the architects sent the plaintiff the following communication:

> Herewith are two prints of a drawing dated January 10th, showing the vertical cracks which have appeared in foundations and walls of buildings and passages.
>
> In our opinion these cracks are due to two causes. First, in leaving the concrete uncovered and exposed to the hot rays of the sun when poured, resulting in a too rapid evaporation of the water and subjecting the walls to a greater expansion than they should have been subjected to. Second, failing to supply heat so that these walls were subjected to a below-zero temperature on both sides, causing a shrinkage strain beyond what they should have been subjected to.
>
> You will, therefore, repair the above cracks except that it will not be necessary to repair cracks on the inside of walls which have been dampproofed and furred.
>
> It will be necessary to rebuild the brickwork at the two cracks designated as Type E in the passages running north and south from Building #4.

The cracks in question developed as a direct result of defendant's faulty design, and were not due to bad workmanship or any departure by the plaintiff from contract requirements.

7. *Wooden blocks behind metal window trim*, $2,642.50.

Wooden blocks behind the metal window trim were neither shown as such on the drawings nor mentioned in the specifications. The specifications of the manufacturer of the trim required wooden blocks to which the trim was to be attached, and they were a necessary part of the construction.

The drawings do indicate material of an undefined nature where the blocks in controversy went. The material so outlined does not bear the symbol of wood otherwise used on the drawings. Defendant's drawing JM-207 shows window-trim details, is in evidence as defendant's Exhibit No. 3, and is made part hereof by reference.

With regard to these blocks the plaintiff communicated with the architects September 13, 1932, as follows:

> Please be referred to jamb section D. Gandy & Earp's drawing No. 1, which is typical jamb section for window trim. On this section is indicated wood blocking "by others." A similar block is indicated on your various sections on sheet JM-207.
>
> Please advise what kind of material is indicated on your plans that this block may be furnished accordingly. Also, please advise which clause of the specifications covers same that we may know how to have it installed.
>
> As we are ready to install this work, it is necessary that we have your answer at once, as the work will be delayed until we are advised what kind of material this is to be made of.

Again, on September 14, 1932, the plaintiff wrote to the architects as follows:

> We have your letter of the 13th directing that certain blocking for the installation of window trim be installed under Article 28 of the specification:
>
> We have directed Gandy & Earp, who are installing the metal window trim, to install this work as directed. We quote below the first two paragraphs of their letter of September 14th in which they specifically claim this is not included in their contract, and as it is not specified elsewhere, we ask that a supplement to the specification be issued in the amount of two thousand six hundred forty dollars ($2,640.00) to cover this work.
>
> "In reply to your letter of September 14th in regard to the wood screeds or blocking, we refer you to paragraph 572. This paragraph calls for the material to be erected according to the manufacturer's specifications.
>
> "Our specifications for this type of construction calls for wood screeds which are to be set by others. This is not only standard specifications with us but also with other metal trim manufacturers. This is clearly shown on our details which have been approved by the Architects. The material we furnish is noted under paragraph 569 and consists of metal work and the sound deadening material only."
>
> Thanking you in advance for your prompt attention, we are,

The letter of the "13th," thus referred to, is not in evidence.

September 15, 1932, the architects replied as follows:

> In reply to your letter of September 14th asking that a supplement be issued in the amount of $2,640.00 for the installation of the wood blocking in connection with the metal window trim:
>
> Our letter of September 13th states clearly that this blocking is included in your contract and that no extra can be allowed for it.

The wood blocks were installed by the plaintiff, and at a cost of $2,642.50.

8. *Common brick for facing matched in color*, $12,720.00. Article 285 of the specifications provided:

> Common brick selected from stock shall be used for facing the exterior surface of the various buildings. It shall be selected for hardness and uniformity of shape and size. Interior common brick work that is not to be concealed by other finish shall be straight brick having full arrises.

A preliminary sample wall was erected. On that occasion the architects insisted that for the sake of appearance the brick be matched for color within a red color range.

The plaintiff had bid on the basis of selection "for hardness and uniformity of shape and size," and not on the basis of uniformity of color within a color range.

As it is taken from the kiln, after firing, common brick of the same mix will tend to be uniform in size, shape and hardness where it is equidistant from the fire. Bricks that receive the same degree and amount of heat will tend to be uniform in color, when of the same mix and firing.

Matching of brick for color, however, as a practical matter, requires special handling by the brick masons at the site, in order to insure the desired match.

The specifications did not require selection for color.

On January 8, 1932, the architects wrote to the plaintiff as follows:

> Enclosed herewith are two (2) copies of Proposed Modifications (dated January 8th, 1932) of the contract specifications.
>
> Most of these modifications are corrections of typographical errors, misspelling and slight changes of the specifications.

Before making these modifications an addendum to the specifications, please let us know if the modifications will either add to or deduct from the contract amount.

If the proposed modifications change your contract amount, let us know the amount added to, or deducted from the contract amount for each item which involves a change in cost.

Among the proposed modifications, transmitted with this letter, was the following:

Paragraph 285—Add to paragraph 285—Brick used for facing the exterior surface of the various buildings shall be selected for color in a red color range.

The plaintiff, after investigating costs, replied to this communication February 1, 1932, as respects the brick work, as follows:

In answer to your letter of January 8th and the "Proposed Modification of the Specification dated October 14, 1931, for Construction of Buildings, etc., for the United States Hospital for Defective Delinquents at Springfield, Missouri":—

"*Brick Work, Hollow Tile Work, etc.*—Add to Paragraph 285—Brick used for facing the exterior surface of the various buildings shall be selected for color in a red color range—Add the sum of Thirteen Thousand Three Hundred Ninety Eight ($13,398.00) Dollars to our contract price."

* * * * *

Samples of common brick for facing were submitted to the architects by the plaintiff and those not matched for color were rejected, and the architects, over plaintiff's protest, required the brick to be matched in a red color range.

No change order was ever issued.

Article 71 of the specifications provided:

The following samples shall be submitted to the Architect and also to the Field Superintendent:

* * * * *

"Facing brick, in sufficient number to show range of colors."

* * * * *

"Common brick."

* * * * *

The final correspondence between the plaintiff and the architects on the subject is of record as follows, from the plaintiff to the architects February 15, 1932, and from the architects to the plaintiff February 18, 1932, respectively:

[Feb. 15, 1932]

> In reply to your letter of February 10th, 1932, regarding extras involved in your Proposed Modifications of the Specifications dated October 14th, 1931, for the construction of the U. S. Hospital for Defective Delinquents at Springfield, Missouri—there must be some misunderstanding about paragraph 285 regarding face brick. I told you when I met you in Washington, to modify this paragraph there would be an extra of $13,398.00. You informed me that there would be no extra allowance for this item. In your letter of February 10th, you state I promised you that this brick would be red. There is some misunderstanding there as we talked it over, we would just leave paragraph 285 the way it existed in the original specification and simply submit brick according to that paragraph for your approval. We will not accept paragraph 285 according to your Modification of October 14th unless there is an extra allowed of the price stated.
>
> We are at the present time negotiating about the brick for the facing of these buildings and samples will be forwarded to you in the very near future for your approval.
>
> * * * * *

[Feb. 18, 1932]

> In reply to your letter of February 15th, regarding the proposed change to paragraph 285, when we explained to Mr. Rasmussen that the proposed change was not calling for special face brick but that the facing brick would be selected from the common brick, the only point we wanted understood was that the common brick was to be red, Mr. Rasmussen stated that the common brick would be red. With this understanding there is really no need to alter the paragraph and we will therefore omit it from the Addendum.
>
> * * * * *

The plaintiff matched the brick, according to the samples submitted. Proof as to extra cost for matching is not satisfactory.

9. *Precast concrete roof slab*, $925.58.

In order to determine whether a concrete slab should be poured in place or should be precast, the contractor had to resort to the structural plans. Neither the specifications nor the architectural plans were framed for that purpose.

During the course of construction a dispute arose between the parties as to whether concrete slabs for the roof of the boiler (power) house should be precast or poured in place.

Structural drawing JM-430, plaintiff's exhibit No. 39, hereby made a part of these findings by reference, displays the typical roof construction for the boiler house, with the descriptive notation "Live Load 40# [meaning 40 pounds] 2½″ Lightweight Concrete Slab." The drawing also shows the rods for the reception of the slabs.

Construction drawing JM-209, which is plaintiff's exhibit No. 36, hereby made a part of these findings by reference, is a drawing giving miscellaneous details of borrowed light frames and trim, and in error indicates this as a 3¼-inch slab.

Article 176 of the specifications provided:

> *Precast insulating nailing, concrete roof slabs.*—All precast slabs to carry approximately 250 lbs. per sq. ft. breaking load uniformly distributed when resting on supports spaced the same as the purlins. All slabs to be of the best workmanship and no cracked, broken, or warped slabs to be placed in the roof. Manufacture shall not be started until the contractor has secured approval of his precast slab details. All slabs are to be erected by or under the supervision of the manufacturer.

A fair reading of the structural plans gives the contractor the option of pouring the contested slabs in place or of having them precast.

September 11, 1932, the plaintiff communicated with the architects by letter as follows:

> A copy of your telegram of September 7th to Mr. Dunbar was handed us along with his letter of the same date stating that the roof slab for boiler house is designed for precast Haydite slab, 2½″ thick, to support 70-pound live and dead load.

In accordance with instruction, we are having shop drawings prepared which we will submit for approval as soon as ready.

To expedite matters, we are quoting below our price for this work, as the work is not provided for on the plans or in the specification. We propose to install 2½″ flat precast Haydite slabs for the roof decks of the power house, exclusive of the monitor or condensor tank walls or roof or curbs around ventilators or skylights, for one thousand one hundred forty-eight dollars even ($1,148.00).

We trust this is in accordance with your understanding and that a supplement will be prepared immediately covering this work that we may have this material manufactured and installed and not delay the completion of this building. Further correspondence concerning this proposal, along with supplement, should be forwarded directly to our Chicago office that same may be signed and validated as early as possible, sending a copy of your letters to this office.

This was replied to by the architects September 13, 1932, as follows:

We are in receipt of a proposal from Mr. Padfield for furnishing precast slab roof for Boiler House.

We can see no reason for issuing an extra order for this work.

Structural drawing #JM-430 shows "Typical Roof Construction" with a note "Live load 40#, 2½″ light weight concrete slab." If you have been guided by detail #25 on sheet JM-209, the only thing in error on this detail is the thickness given of 3¼″.

Furthermore, if a poured stone concrete slab was intended, there would be no reason for the tie rods shown in connection with the roof steel. A check on the design of the roof steel would also show that it is not designed to carry the additional load that would be imposed by a poured stone concrete slab.

The plaintiff began to make arrangements for precasting the slabs and September 16, 1932, addressed the architects as follows:

Under separate cover we are mailing to you today for approval four prints of a drawing showing the proposed layout for concrete roof slabs on the main portion of the Boiler House. These are furnished us by our subcontractor, The George Rackle & Sons Co.

In submitting these drawings for approval we are not acknowledging that this work is included in our contract, but are proceeding with the work as instructed in your Mr. Dunbar's letter of September 7th and are expecting that a contract supplement be issued to cover the additional work.

We note that the Geo. Rackle & Sons Company have not incorporated on this drawing details for roof over the condensate tank room No. 11. We are advised verbally by Mr. Dunbar that this will require a precast roof and are instructing the Geo. Rackle & Sons Co. to prepare shop drawings and an estimate for this work that the entire matter may be taken care of in one supplement.

As the boiler house should be put under roof at the earliest date possible, we trust these drawings will have your usual prompt attention.

The question of a slab over the roof for the condenser tank having arisen, there followed a letter September 21, 1932, as follows:

In submitting Drawing #5 of the Geo. Rackle & Sons Company covering additional precast Haydite slabs for the roof decks of the Power House it was noted that no roof had been provided for over the condensate tank room. We advise you in submitting the drawing that we would ask the Rackle Company to submit a price for this work, after a conversation with Mr. Dunbar developed a precast slab roof is wanted over this room. You will note that our proposal dated September 11th excludes the monitor, which has already been installed, and the roof over the condensor tank walls or roof or curbs around ventilators or skylights.

We are pleased to advise you that we will erect 2½″ nailing slabs to cover the roof over this condensor tank for the additional sum of one hundred twenty-seven dollars even ($127.00).

The above will make a total addition to our contract of $1,275.00 for the additional precast roof slab mentioned above and in our proposal of September 11th. It will be agreeable with us for you to issue one supplement to cover these items, and we will appreciate advice that this will be done.

We are instructing the Rackle Company to submit shop drawings covering the roof over the condensate tank room and same will be forwarded to you for approval as soon as received.

On October 3, 1932, the plaintiff applied to the architects as follows, for a decision in the matter:

> In accordance with paragraph 30 of the specifications for the above project, we are hereby applying for your interpretation of the detail shown on structural drawing JM-430 which is headed "Typical Roof Construction," with a note "Live Load 40# 2½" Light-weight Concrete Slab."
>
> We ask that you please inform us if this is to be a precast lightweight concrete slab, or if it is to be a poured lightweight concrete slab.
>
> We ask that you give us your decision in this matter by return mail as weather conditions make it absolutely imperative that we have your very early decision. This building must be completely enclosed in the very near future.
>
> Trusting you will comply with our request, * * *

The decision was given October 4, 1932, as follows:

> In answer to your letter of October 3rd regarding Boiler House Typical Roof Construction, we replied today by telegraph advising you that the detail on JM-430 intended the use of precast slabs of haydite or similar light concrete construction.

The plaintiff installed precast slabs, as required by the architects. There is no satisfactory proof of the difference in cost between pouring of the slabs in place and precasting them.

10. *Hollow metal frames for pencil wire guards*, $2,120.67. Article 469 of the specifications provided:

> The wire screen guards on inside of basement and first and second story windows of storehouse (except Bakery windows), and on inside of windows and radiators in Disturbed Patient wing of Main building and Strong Room wing of Acute Building shall be hinged to the metal window trim (see details and spec. of window trim). * * *

On windows where pencil wire guards were to be installed the plaintiff proposed to hinge such guards directly to the metal window trim. Defendant's officers required the intervention of a hollow metal frame, framing the pencil wire guard, with the frame hinged to the metal window trim.

Contract drawings JM–207 and JM–208, being defendant's Exhibit No. 3 and plaintiff's Exhibit No. 35, respectively, and hereby made part of these findings by reference, indicate the use of hollow metal frames in notations as follows, the abbreviation "H. M." standing for "Hollow Metal":

> (1) #6 U. S. ga. banded 1½″ diamond mesh wire guard in 1″ x ½″ [frame mounted in H. M. frame provided with hinges and padlock.
>
> (2) #6 U. S. ga. banded 1½″ diamond pattern wire guard 1″ x ½″ channel frame mounted in 1½″ H. M. frame.
>
> (3) ¼ pencil rod guard with rectangular mesh welded at intersection in 1″ x ½″ [frame mounted with insect screen in a H. M. hinged frame provided with padlock.

The architects required the use of a hollow metal frame, and it was installed by the plaintiff under protest at an extra cost of $2,120.67.

On this matter the architects ruled May 23, 1933, in letter to the plaintiff as follows:

> We have your letter of May 22nd regarding pencil rod guards and insect screens for porches, solaria and Storehouse windows.
>
> We wish again to call your attention to our letters to you of December 15th, 1932, January 23rd, February 21st and March 29th directing you to proceed with the work either on the basis of revised detail or on the basis of contract drawings, no answers to which have been received with the exception of your letter of January 31st. Our subsequent letters of April 18th and May 9th requesting you to advise us of which you proposed to do have also remained unanswered.
>
> We state again that the entire work is a part of your contract, being covered by paragraphs 469, 471, 472, 473, 551 and by scale detail drawings JM–207 and 208.

11. *Extra sewer tile and gas stops*, $294.96.

After completion of the contract the plaintiff and the architects negotiated for settlement of an item of extra work, excavating for and installing 350 linear feet of 6-inch branch tile sewer connections to staff residence sites and providing and setting six 4-inch brass gas stops on main in street. This extra work, not covered by the contract, had been ordered by the architects and performed by the plaintiff with the under-

standing that a formal order would follow. This procedure conformed with the practice of the parties in the performance of extra work, in order that formalities might not delay progress. The price had not been agreed upon orally or in writing.

Pursuant to these negotiations the following invitation and proposal was signed by plaintiff and architects as indicated. The purported acceptance followed sometime thereafter in an amount not agreed to by the plaintiff, but a check was issued and sent to the plaintiff which included the proposed amount of $935.96. Defendant issued a stop order against this check, and another was substituted, reduced by $294.96. There is no explanation why the amount was reduced.

Supplement No. 137

DEPARTMENT OF JUSTICE

BUREAU OF PRISONS

HOSPITAL FOR DEFECTIVE DELINQUENTS

Invitation

JOSEPH A. HOLPUCH CO.,
4010 West Madison St., Chicago, Illinois.

APRIL 15, 1933.

You are requested to submit a proposal in connection with your Contract JIC–1140 for excavating for and installing 350 lin. ft. of 6″ branch tile sewer connections to staff residence sites and providing and setting six 4″ brass gas stops on main in street.

JOANNES AND MARLOW,
Architects.

Proposal

APRIL 20TH, 1933.

We propose to make the change as outlined above for an additional cost of Nine hundred Thirty Five & 96/100 Dollars------------------------------ $935.96.

The above change involves no extension of time.

JOSEPH A. HOLPUCH COMPANY,
JOSEPH H. HOLPUCH,
Secy.

This work is not included in the contract and can only be done by present contractor and the price quoted is reasonable and just.

JOANNES AND MARLOW,
Architects.

Acceptance

JULY 28, 1933.

The above change of contract is approved at an additional cost of Six Hundred Forty One Dollars__ $641.00.
For the Attorney General

SANFORD BATES,
Director, Bureau of Prisons.

NOTE: This form is to be submitted with original and five copies.

The authority of Sanford Bates, Director, Bureau of Prisons, to act in the matter does not appear.

On the Counterclaim

The parties hereto have filed an agreed statement of facts respecting tax transactions, which is incorporated in these findings as follows:

12. On September 15, 1937, the plaintiff filed a capital stock tax return for the year ended June 30, 1937, showing an adjusted declared value for its entire capital stock of $726,464.17, resulting in a tax shown to be due of $726.00, together with interest of $5.45 because of failure to file the return when due.

On the September 1937 Special Miscellaneous Tax List, page 4001, line 3, an amount of $734.47 tax and interest was assessed against the plaintiff. This increase was due to the fact that plaintiff did not correctly compute the amount of interest due.

Thereafter, a notice and demand for the payment of the above-mentioned amount of $734.47 was issued to plaintiff but no part of such amount has ever been paid by plaintiff to the United States.

13. On March 30, 1937, the Commissioner of Internal Revenue sent to plaintiff by registered mail a 90-day deficiency letter informing it that a determination of its income tax liability for the year 1933 disclosed a deficiency of $19,565.01

and a determination of its excess profits tax liability for the same year disclosed a deficiency of $6,987.61.

Thereafter, plaintiff filed a petition with the United States Board of Tax Appeals seeking a redetermination of the deficiencies asserted in the above-mentioned 90-day letter. On July 30, 1937, the United States Board of Tax Appeals entered an order of dismissal of said case entitled *Joseph A. Holpuch Company* v. *Commissioner of Internal Revenue*, Docket No. 89637, for failure properly to prosecute by the filing of a proper petition in accordance with the rules of practice of the Board.

14. In November 1937, the Commissioner of Internal Revenue assessed the amounts of the deficiencies mentioned in Finding 13 above, together with interest, against the plaintiff as follows:

Income tax	$19,565.01
Interest to November 12, 1937	4,296.53
Excess-profits tax	6,987.61
Interest to November 12, 1937	1,534.49
Total	32,383.64

This assessment appears on the records of the office of the Collector of Internal Revenue in Chicago, Illinois, on the November 1937 List OS C No. 2.

Thereafter, a notice and demand for payment of the above amount of $32,383.64 was issued to plaintiff but no part of this amount has ever been paid by plaintiff to the United States.

The court decided that the plaintiff was entitled to recover the sum of $1,054.94, and that the defendant on its counterclaim was entitled to recover the sum of $33,118.11, with interest.

WHALEY, *Chief Justice*, delivered the opinion of the court:

On December 9, 1931, the plaintiff entered into a contract with the defendant for the erection of nine buildings of the Hospital for Defective Delinquents at Springfield, Missouri. The architects were Joannes & Marlow, of New York City, and by Article 30 of the specifications they were the duly

authorized representatives of the contracting officer, William D. Mitchell, Attorney General.

The agreed work was performed. The contractor sublet the entire work and divided it among its subcontractors by paragraphs in the specifications.

As disclosed by the findings, certain claims have been withdrawn. There are other claims that fail for lack of satisfactory proof as to the extent of alleged damages. These latter claims include that for cost of installing Carthage marble in place of limestone, for extra cost of matching brick for color, and for precasting slabs instead of pouring them in place. On those claims the plaintiff accordingly cannot recover.

The remaining claims will be taken up in the order in which they appear in the findings of fact.

The first of these is for furnishing and installing extra steel dressers or cabinets.

The scheme of the plans and drawings made clear what was and what was not included in the contract. The plot plan bore the note: "Buildings and other work shown dotted are not included in this contract." Of course this could only mean that work shown in solid lines was part of the contract. These cabinets or dressers were scattered over the project. The drawing showing the detail of the cabinets stated: "See plans for locations." Nothing could be more definite as to number and location of the cabinets, and they were shown in solid lines in the diet and service kitchens. The controversy is over the question whether those cabinets or dressers were to be furnished and installed in the kitchens indicated.

Article 2 of the contract (it is quoted in the findings) provides that: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both." This is part of plaintiff's agreement; the architects, acting as contracting officers, ruled that the kitchen cabinets were included in the contract, and their decision was final under Article 30 of the specifications. The record shows no appeal. Nothing more is due and the plaintiff may not recover on this item.

The second item is for the cost of repairing cracks in corridor walls. It is found by the court that these cracks developed as a direct result of the defendant's faulty design. It hardly needs the testimony of an expert witness that such cracks would develop in concrete foundations and extend into the overlying brickwork, where the concrete foundations were 200 feet or over and without expansion joints. It was bound to crack somewhere. Defendant's officers refused to accept the buildings with the existing cracks. The walls and their foundations had been constructed in accordance with contract requirements and under the constant inspection of defendant's officers. The defendant's refusal to accept the buildings after such performance was a breach of the contract. The plaintiff is entitled to recover its damages, which amount to $1,054.94.

The plaintiff sues for $2,642.50 for furnishing and installing wooden blocks behind metal window trim.

The plaintiff's subcontractor for the metal window trim insisted that the plaintiff supply these blocks for installation purposes. The plaintiff thereupon called upon the architects to supply an order for these blocks as extra work. The architects ruled that they were already required by the contract, were not extra work, and that there would be no addition to the contract price. The drawings indicate material of an undefined nature where the blocks in controversy went. The architects acted for the contracting officer and by Article 30 of the specifications the decision of the contracting officer's representative as to the proper interpretation of the drawings and specifications was final. But without such a provision, and such a decision, the drawings required a block of some material or other, and there is here no contention that the material should have been other than wood. On this item the plaintiff may not recover.

Plaintiff sues for $2,120.67, cost of installation of hollow metal frames for pencil wire guards, hinged to the metal window trim. The plaintiff, in the course of the work, protested that these frames were not required. The architects demanded their use, claiming that their installation was part of the contract, citing pertinent drawings and specifications. The architects' decision was a fair and

reasonable interpretation of the contract provisions, they were acting for the contracting officer, and this being so, the plaintiff is not entitled to recover.

The last item is a claim for alleged shortage in payment on an order for additional sewer connections and gas stops, work not provided for by the written contract. The facts are not in dispute. It was extra work, not required by the contract. It had been ordered by the architects and performed by the plaintiff with the understanding that a formal order would follow. This accorded with the practice of the parties on the contract work, although it was not authorized by the contract. The price had not been agreed upon.

There was no compliance either with Article 3 of the contract on "changes" or with Article 5 on "extra work."

The work was done and the plaintiff has been paid therefor $641.00. The defendant has thus acknowledged a liability, but it has not acknowledged a liability in excess of $641.00. The question presented is whether there was an express agreement or an agreement implied in fact to pay more.

The supposed invitation, proposal, and acceptance, exhibited in the findings, is no such agreement. It is stated in prospective terms, when the work was already done. The only thing remaining to be done was agreeing upon the price. If the plaintiff's proposal be limited to the offer of $935.96 as the price, that offer was not accepted. What authority the director of prisons had does not appear, but that is not important, because even he did not accept the proposal of $935.96. The director would not go above $641.00 and that was all that plaintiff finally received.

Whether there was an agreement to pay that amount may be questioned. However, it was paid and the defendant apparently concedes liability to that extent. But there was no agreement to pay more, and we do not know what the extra services were reasonably worth.

There can be no recovery on this last item of plaintiff's claim.

The plaintiff is entitled to recover $1,054.94.

The defendant's counterclaim for capital-stock, income and excess-profits taxes is not resisted, and the defendant is entitled to recover thereon the two principal amounts of

$734.47 and $32,383.64, with interest at six percent per annum on $734.47 from September 1937 and on $32,383.64 from November 12, 1937.

It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHITAKER, *Judge*, took no part in the decision of this case.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN & LEIGHTON, A PARTNERSHIP, v. THE UNITED STATES

[No. 45002. Decided May 7, 1945]

On the Proofs

Government contract; unwarranted prolongation of performance.—Where plaintiffs undertook the construction of a hospital building under a contract with the Veterans' Administration; and where performance was delayed because of difficulties encountered in driving satisfactory piling for the foundations; and where negotiations were undertaken between the parties to settle the increased costs and work involved; and where changes in the price and an extension of 75 days were accepted by plaintiffs with the assurance in writing that the changes would settle the matter in its entirety; it is *held* plaintiffs had received adequate compensation for the extra work by the accepted change order and are not entitled to more.

Same; winter work due to change order.—Where the extra work under the change order prolonged performance into the winter, when working conditions were more difficult, the shifting of work was due to authorized changes and cannot be considered a breach of the contract.

Same; failure to furnish temporary heat.—Where the defendant failed to fulfill its contractual obligation to furnish temporary heat for painting, varnishing, floor tile setting and related interior work; it is *held* that plaintiffs are entitled to recover for the delay caused thereby.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs are citizens of the United States and residents of Philadelphia, Pennsylvania. At all times here involved they have been engaged in the building construction business as partners under the firm name of "Irwin & Leighton."

2. July 11, 1936, the parties entered into written contract No. VAC 682, whereby the plaintiffs agreed to construct Hospital Building No. 76 at Veterans' Administration Facility, Bath, New York, in consideration of the sum of $741,800, which contract, marked Plaintiffs' Exhibit No. 1, and the accompanying specifications, marked Plaintiffs' Exhibit No. 2, are made a part of these findings by reference. The plans show the principal portion of the building to be approximately 375 feet long and 78 feet wide, lying generally in a north and south position. The southern end is referred to as the "south" wing. At the south end a "kitchen wing" extends to the west at a right angle, the entire structure forming a reversed L.

3. Article 9 of the contract provided that, in the event of failure on the part of the contractors to prosecute the work with such diligence as would insure its completion within the time provided, the plaintiffs would pay to the United States as liquidated damages for the delay, in lieu of actual damages "which will be impossible to determine," the sum of $150 per calendar day for each day of delay until the work should be completed.

Article 9 further provided:

> * * * the contractor [shall not be] charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement

of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

4. The contract provided that work be commenced within 10 calendar days after receipt of notice to proceed and that the work be completed within 450 calendar days. July 27, 1936, plaintiffs received from defendant a written notice to proceed, thereby fixing October 20, 1937, as the date of completion. They commenced operations at the site July 29, 1936. Plaintiffs did not complete the work until February 19, 1938, on which date the work was accepted by defendant, 122 days after October 20, 1937, the date for completion established by operation of the notice to proceed. No liquidated damaged were imposed upon plaintiffs because the contracting officer extended the time for completion 122 days by the change orders hereinafter mentioned.

5. With reference to changes in drawings and specifications, subsurface and latent conditions, and extra work, the contract provided:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * *

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recog-

nized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

DELAY IN PILE DRIVING AND RESULTING DELAY IN COMPLETING CONCRETE FOOTINGS AND SUPERSTRUCTURE

Plaintiffs' principal claim is based upon (1) delays alleged to have been unavoidably suffered because of unanticipated conditions in the subsoil, and (2) alleged dilatoriness upon the part of representatives of defendant in adjusting contractual requirements so as to permit plaintiffs to minimize the delay.

6. The plans required that foundation footings rest on piles, and the specifications designated and described the method of installing two types of piles upon either of which bids could be submitted. The bid submitted by plaintiffs and accepted by defendant specified one of these, a cast-in-place concrete pile known as a "cased pedestal pile." Such a pile is made by first driving into the ground by hammer blows a heavy steel casing of 16 inches outside diameter, within which is a removable solid plunger or core. When the plunger-contained steel casing has been driven to a depth of specified bearing value, determined by the degree of resistance to further driving, the plunger is withdrawn from the casing and 4½ cubic feet of concrete is poured into the casing, filling only the bottom portion. The plunger is reinserted and, as the plunger is pressed upon the wet concrete, the casing is partially withdrawn until the bottom of the casing is even with the bottom of the plunger. The pressure spreads the concrete against the surrounding earth, forming

a "bulb" in the ground at the bottom of the hole. The plunger-contained casing is then redriven part way into the concrete bulb and the plunger is again withdrawn, leaving the end of the casing embedded in the bulb. A corrugated iron shell, slightly smaller than the casing, is dropped inside the casing into the concrete bulb and the casing is then withdrawn, leaving the corrugated iron shell with its lower end embedded in the concrete. The shell is then filled with concrete and the whole remains permanently in place to form the completed pile. Piles constructed in this manner are here termed "specification piles."

7. Prior to preparing plans and specifications, defendant caused several open pits, between four and six feet deep, to be dug in order to make load tests for bearing value of the soil. Some of the pits disclosed a gravelly condition, and such varying conditions were disclosed in different places, and it was determined by defendant's engineers that spread footings would not be adequate and that piles must be used. To eliminate the hazard of open pits, they were refilled and were not available for examination by bidders. The pits did not extend as deep as the levels from which, after necessary excavation, the piles were to be driven.

Except to determine whether piling would be required, these pits were not dug to acquire data with reference to piling. For that purpose 18 borings, varying in depth from 28 to 48 feet, were made at points within or immediately adjacent to the area to be occupied by the proposed building. These borings disclosed conditions which satisfied defendant's engineers that piles of the nature specified could be driven in the manner specified. The data disclosed by 16 of the borings were recorded on Drawing No. 76–35, which drawing was a part of the bid data. A notation on this drawing read:

Note.—The Boring Data shown hereon are offered as information concerning the types of materials encountered at the points indicated on the Location Plan. Contractor shall visit the Site and make such determinations of surface and subsurface conditions as he may require. Borings made during Feb., 1936.

8. Before compiling their bid for the entire job, plaintiffs requested a bid for the piling work from the Western Concrete Pile Corporation of New York, N. Y., hereinafter called the "piling subcontractor." The data shown on Drawing No. 76–35 were considered by the piling subcontractor in making its estimates of time required and in submitting its bid to plaintiffs. Plaintiffs relied on the piling subcontractor's bid to them in making up their bid to defendant. The data disclosed by the test pits and by two of the borings were not included in Drawing 76–35 or otherwise communicated to plaintiffs or to the piling subcontractor. It does not appear what conditions were disclosed by the omitted borings or whether knowledge of such conditions or of the conditions disclosed by the test pits would have affected the piling subcontractor's or the plaintiffs' bid.

9. Before the piling subcontractor submitted its bid to plaintiffs, its representative examined the drawings and visited the site of the proposed building. There was not sufficient time after the defendant invited bids for prospective bidders to make additional borings, and, if there had been time, the cost to a bidder would have been prohibitive. The piling subcontractor's representative did, however, drive test rods near the locations of the borings to check the accuracy of the data disclosed by the drawings. These rods collected small samples at each three feet of depth and the data disclosed by the test rods were approximately the same as those disclosed by the borings. With this data the piling subcontractor submitted its bid to plaintiffs for the piling work. Plaintiffs relied on the bid of the piling subcontractor and it became one of the bases for plaintiffs' bid on the entire job. After the contract was made between plaintiffs and defendant, the plaintiffs entered into a contract with the piling subcontractor for the piling work on the prices bid by it and to be performed within the time contemplated by plaintiffs' progress schedule hereinafter mentioned.

10. The piling subcontractor estimated that the required pile driving would proceed at the rate of 22 piles per working day, one shift per day, which, for the 739 piles estimated on the contract drawings, would have made a total of 34

working days, with one day added for moving the equipment between levels. This amounted to approximately 7 weeks or 50 calendar days. The piling subcontractor had first-class equipment and experienced superintendents and crews, and the estimate of 22 piles per day was reasonable on the basis of information shown by drawing 76-35, as confirmed by the subcontractor's rod tests, and in the absence of knowledge of the unusual subsoil conditions later found to exist. The representative of the pile-driving subcontractor, who examined the drawings, inspected the site, and made the estimate, was a graduate engineer, who had been engaged in the practice of his profession more than 30 years, and had been in the pile-driving business most of that time. The pile-driving subcontractor's bid to plaintiffs was based on his estimate.

11. Plaintiffs' calculations of the price to be bid and the time within which the various operations might be performed were made primarily by Archibald O. Leighton, one of the plaintiff partners, who had approximately 38 years' experience in the contracting business, and John Andrew Irwin, construction manager for the plaintiffs, a graduate civil engineer with approximately 20 years' experience, the last 16 of which were in the construction business. In formulating plaintiffs' bid these men calculated that the work would be prosecuted in such a manner that by January 1, 1937, the concrete superstructure for the entire building would be completed. This would have included clearing the site and demolition of existing structures thereon, excavations for foundations, pile driving, all work in the construction of concrete footings and all work necessary to the construction of the reinforced concrete columns, beams, and floors which would constitute the superstructure. Measured by value, the completion of the superstructure would constitute completion of approximately 28 percent of the total work to be performed under the contract. In making these calculations consideration was given to the fact that some of the work in constructing the concrete superstructure would have to be performed in November and December 1936, and that some cold weather could be expected to occur

during those months. Plaintiffs' plan to complete all work preliminary and necessary to the completion of the concrete superstructure by January 1, 1937, was reasonable on the basis of information then possessed and of conditions which reasonably should have been anticipated.

12. In order to show the amount of work planned to be completed within definite time periods, plaintiffs prepared a progress schedule in the form requested by defendant, indicating by percentages of value the work to be completed at various times between July 27, 1936, the date the notice to proceed was received by plaintiffs, and October 20, 1937, the time for completion under the contract. The progress schedule shows 28 percent planned to be completed about January 6, 1937. It would have been feasible and practicable to complete the concrete superstructure by January 1, 1937, in the absence of the delays hereinafter described. Plaintiffs submitted the progress schedule to defendant's utility officer who concurred in the estimates of time and who, together with the director of construction for defendant, approved the schedule.

Plaintiffs' plan of operations contemplated the placement of concrete caps on piles and construction of concrete footings concurrently with pile-driving operations as soon as the pile driving became sufficiently advanced that vibration of the ground from the pile driving would not harm the structural value of the concrete. Except for the delays in pile driving hereinafter described, the placement of concrete caps on piles and construction of concrete footing would have been commenced as early as September 10, 1936.

13. July 29, 1936, plaintiffs commenced clearing the site. Excavation and other necessary preliminary operations were sufficiently advanced that pile driving was commenced August 17, 1936, in what is known as the kitchen wing. Four piles were driven in accordance with the specifications in the group designated on the plans as C–1. One of these piles was selected by defendant's utility officer, capped, and tested by putting on it the various loads required by the specifications. On August 22 the pile failed by settling beyond the amount tolerated by the specifications. Defendant's utility

officer at the site immediately notified defendant's contracting officer in Washington, D. C., who on August 26, four days later, replied that the piling must meet the load-test requirements, that "the number of blows, etc," for all piling must be that required to meet the approved load test; that there would be no objection to increasing the quantity of concrete in the pedestal, but that no increase in contract price or time should be allowed.

14. August 27, 1936, upon instructions of defendant, plaintiffs drove four more piles in the kitchen wing in the group designated D–1. August 31, 1936, the pile in this group selected by the utility officer for load testing failed by settling beyond the amount tolerated by the specifications. The utility officer notified the contracting officer of the second failure and, as a result, on September 3, 1936, defendant's Structural Engineer Brown arrived at the site of the work.

15. September 3, 1936, in the presence of Engineer Brown, a third test pile was driven immediately outside the piles in Group D–1. This pile was driven in accordance with the specifications except that it was driven to a resistance to 11 hammer blows instead of 6, and that 8 cubic feet instead of 4½ cubic feet of concrete were used for the pedestal.

In conferences between representatives of plaintiffs and Engineer Brown it was agreed, and it is here found, that the unusual resistance to driving and the failures under test loads were due to the presence of a layer of rubbery yellow clay below which was a layer of soft blue clay. The yellow clay resisted penetration and caused the driving apparatus to bounce under hammer blows, but when subjected to the steady pressure of test loads, a pile would settle into it beyond the limit tolerated by the specifications. In view of this condition it was agreed to drive a test pile of a different type than that specified, and on September 3, 1936, the same day the third test specification pile was driven, three "compressed" piles were installed in the group designated E–4. In order to achieve more penetration than was found possible by driving in the manner required by the specifications and to test the behavior of the blue clay, penetration was secured by "coring." Coring was accomplished by driving the steel casing without the solid plunger and removing the resulting core

of earth from inside the casing. This having been done, the casing was filled with concrete, the plunger applied to the top of the concrete and the casing withdrawn as pressure was exerted on the concrete by the plunger, thus compressing the concrete against the earth laterally and securing frictional resistance along the sides of the completed pile as well as at the foot. A pile so constructed is called a "compressed pile."

16. In order to give the test specification pile outside Group D–1 more time to set and to allow the soil to settle around the pile shaft, it was decided first to test one of the compressed piles in Group E–4. This test was completed September 9, 1936, and the compressed pile successfully sustained the test loads without settling beyond tolerated limits. The test of the specification pile driven outside Group D–1 was commenced.

17. September 10, 1936, plaintiffs telephoned the contracting officer that the compressed pile had successfully passed the load test and that test of the specification pile outside Group D–1 was in progress, asking that the contracting officer consider further procedure in the event the specification pile failed in the pending test. September 11, 1936, the contracting officer telegraphed Engineer Brown that it was satisfactory to use compressed piles in the kitchen wing to secure proper carrying capacity and to core if necessary. He further directed that before driving piles in any other portion of the building a specification pile must be driven and tested in the southwest wing. He also asked that the contractor be requested to submit a proposal for substituting compressed piles in instances where compressed piles would be directed.

18. The same day, September 11, 1936, the specification test pile outside Group D–1 failed by settling beyond the limit tolerated by the specifications and plaintiffs notified the contracting officer by telegraph urging prompt action and stating that they expected to be reimbursed for time and expense.

19. September 12, 1936, plaintiffs wrote to the contracting officer confirming a telephone conversation on the same day and stating that in proceeding to install compressed piles in the kitchen wing and to core where necessary, plaintiffs

did so without prejudicing their claim for additional compensation, including additional expense due to delays as well as additional cost of the piles themselves.

This letter was acknowledged September 17 by the contracting officer, who wrote that no action could be taken on plaintiffs' claim at the time because the claim was not specific, but that it was understood plaintiffs were proceeding with the pile work as required by the contract.

To this letter plaintiffs replied by letter dated September 19, saying that they understood they were proceeding according to the contract as necessarily modified by changed conditions and that there was to be adjustment due to the type of piles being driven in the kitchen wing; that they further understood that should any change in the type of piles be necessary in the main portion of the building, there should be an adjustment.

The contracting officer wrote on October 15 that the defendant understood plaintiffs' position but that it would be guided entirely by the contract and specifications; and that any changes from the contract would be treated as provided for therein.

20. Meantime, on September 14, 1936, plaintiffs had been given written instructions by the utility officer to install compressed piles in the kitchen wing and to core where necessary; also to drive a test specification pile in the southwest wing before any piles were driven in the lower level, i. e., the main portion of the building.

Commencing September 14 plaintiffs proceeded to install compressed piles in the kitchen wing, none of which could be installed without coring. On September 17, pursuant to written instructions from the utility officer, plaintiffs moved the pile-driving apparatus to the lower level in the southwest wing where a specification test pile was driven on September 18. Plaintiffs moved back to the kitchen wing and driving piles in that wing was completed on September 28. All those piles were compressed piles and coring was resorted to wherever it was found that the piles could not be driven in the manner required by the specifications.

21. During the next two days plaintiffs moved the pile-driving apparatus to the lower level in the south wing and

on September 30 were notified in writing by defendant that the specification test pile in that wing had been approved and that plaintiffs should proceed driving specification piles in the main portion of the building. Similar written instructions were given plaintiffs by the utility officer on October 2, with the direction that, should driving characteristics change materially, he be advised promptly so that further load tests could be made or a change made in the type of pile.

22. Plaintiffs resumed driving in the south wing on October 1. In that area, in about half of the instances, piles could not be driven in the manner required by the specifications. The piles in approximately 38 percent of the groups in this area were driven according to specifications. In approximately 38 percent of the groups plaintiffs had to resort to coring, while in approximately 24 percent of the groups there was installation by both methods. The occurrence of conditions requiring coring was irregular, no one substantial portion of the area being exclusively supplied with either type of installation. In this area and in areas subsequently driven, many piles could be installed only by coring first and then driving to secure the bearing value required by the specifications. At the time of driving in this area defendant required that plaintiffs attempt to drive piles according to specifications, and, if that method failed, to notify defendant's utility officer at the site. The utility officer did not have the authority to permit departure from the specifications and in each instance where it became necessary to core, plaintiffs had to suspend driving operations on the particular pile while the utility officer communicated with the contracting officer in Washington and received instructions. He would then give plaintiffs permission to core. In some instances in the early days of driving a small amount of coring, to an extent not shown, was done without permission first having been obtained.

23. October 23 the progress in pile driving reached the juncture of the south wing with the central portion of the main building, at which point there occurred pockets of clean gravel of such a nature that piles could not be driven or the cored material removed by the usual methods. Defendant

was notified of this condition and on October 26th the utility officer wrote to plaintiffs that it would be satisfactory if a compressed pile were driven conforming with certain requirements, but that on any adjacent location specification piles were to be driven, and, if similar difficulties should arise, to advise him in order that steps might be taken to overcome the difficulties.

24. Compressed piles were driven in two groups at the juncture of the south wing with the main building. As driving continued in the central portion of the main building specification piles were driven by coring until November 12. Meantime, on November 2 plaintiffs had telegraphed the contracting officer and the utility officer that plaintiffs could not accept any orders for changes from the specified type of pile except with the understanding that such changes would be made subject to adjustment of contract time and price. November 4 the utility officer at the site wrote to plaintiffs requesting that they submit a proposal without delay on a unit price per foot for driving compressed piles and stating that no additional compressed piles should be driven until a definite price agreement should be reached, and then only as instructed; that plaintiffs stop pile driving in any location where the pile ended in blue clay and produce a decided bounce, as the utility officer wished to make a personal inspection before any further pile driving would be done.

November 9 the contracting officer telegraphed plaintiffs, stating that plaintiffs were directed to use compressed piles as directed by the superintendent in areas where soil conditions required. This was the first authority for the utility officer at the site to decide whether other than specification piles could be installed.

Until the pile driving was completed on January 11, 1937, plaintiffs continued to drive piles first by attempting to follow the method prescribed by the specifications, and when upon such trial it was ascertained that a specification pile could not be driven because of subsurface conditions, to call the utility officer to the site to examine such pile and to obtain permission to drive a pile of a different type.

25. In the performance of the pile-driving work plaintiffs installed a total of 749 concrete piles. Of this total plain-

tiffs were able to drive only 124 in the manner required by the specifications. It was necessary to core for the installation of 280 specification piles. In 318 instances it was necessary to install compressed piles. It was necessary to drive 25 composite piles with compressed type upper sections and 2 composite piles with the specification type of upper section. A composite pile is one used where the subsurface soil condition is such that neither a specification pile nor a compressed pile would provide the requisite bearing value. The composite piles were produced by first driving wooden piles deep into the earth, with the top a substantial distance below the surface, and then constructing concrete piles of either of the types heretofore mentioned on top of the wooden piles.

26. Between the time the pile driving commenced and the time pile driving was completed on January 11, 1937, plaintiffs were delayed by the various circumstances above mentioned. Delays resulted directly from the unanticipated subsoil conditions, the mode of operation imposed upon plaintiffs by defendant in meeting the unanticipated subsoil conditions, bad weather, and break-downs of plaintiffs' equipment with necessary repairs. Time aggregating approximately five days was lost by reason of rain and snow. Time aggregating approximately five days was lost by reason of break-down of plaintiffs' equipment and repairs incident thereto. One day longer than the time estimated to move the equipment from the upper to the lower level was required. If the three items of delay last mentioned had not intervened the pile driving would have been completed December 31, 1936. If the unanticipated subsoil conditions had not intervened the pile driving would have been completed October 10, 1936, a delay in pile driving of 82 days.

It is impossible to estimate with any degree of certainty what proportion of the loss of time due to unanticipated subsoil conditions was due to the necessity for a change in the type of pile and what proportion was due to the mode of operation imposed upon the plaintiffs by the Government when it was necessary to install a different type of pile than that specified.

27. As a result of the delay in completing the pile driving, the building of forms and pouring of concrete for the foot-

ings and superstructure were also delayed, although plaintiffs had an adequate force and facilities at the site to perform the work within the time they had calculated. As of January 1, 1937, at which time plaintiffs had calculated to have completed the concrete superstructure, plaintiffs had been able to perform less than one-fourth, measured by value, of the installation of the concrete footings and superstructure.

28. Plaintiffs continued work during the winter months of January, February, March, and the first part of April in an attempt to complete the work without further delay. To perform the concrete work during such months, plaintiffs were required to heat the materials used in mixing the concrete, to maintain temporary heat to protect the concrete, and to wrap portions of the building in order to prevent freezing. Accumulated ice and snow had to be removed from forms in the mornings before fresh concrete could be poured, and salt hay had to be placed upon newly poured concrete as a protection against the cold. Runways had to be treated with salt to keep down accumulations of ice and snow. These conditions prevented plaintiffs from pouring concrete to the normal maximum capacities.

29. While still engaged in the pile driving, and on November 23, 1936, in compliance with a request by defendant, plaintiffs submitted a proposal in writing for an increased unit price per foot for piling and for a change in the rates allowed the defendant for any under-run in lineal feet of piling. The proposal also claimed an extension of 125 days because of delays due to changed conditions.

The final paragraph of the written proposal said:

> The adjustments mentioned herein cover only the adjustment of the cost of the piling work itself and have no bearing on the additional cost of the other parts of the work imposed on us by these changed conditions. We are, therefore, presenting the above estimates with the distinct understanding that it is without prejudice to a claim which we will subsequently submit covering additional costs on the entire contract. It is impossible for us to determine at this time what the amount of this claim will be, but we will present a claim for this additional compensation at such time as we are able to determine its amount.

December 11 defendant wrote to plaintiffs stating that no definite action could be taken until certain detailed information was submitted.

30. Thereafter various conferences were held and on February 11 1937, the piling work having been completed in the meantime, plaintiffs submitted a detailed estimate covering a claimed additional cost of piling due to changed subsoil conditions and requesting an extension of 109 days in lieu of the 125 days theretofore requested.

The letter submitting this estimate stated:

> You will understand, of course, that this estimate does not include any of the items mentioned in the last paragraph of our letter of November 23rd.

31. March 1, 1937, representatives of the plaintiffs and of the defendant conferred again and in consequence on March 4 plaintiffs made another proposal in writing as follows:

> As a result of our conferences regarding the additional cost of the piling work at the above project due to changed subsoil conditions, we submit herewith our revised estimate of this additional cost in the sum of $4,208.62. Itemization of this estimate is attached hereto.
>
> It is our claim that in the completion of the entire work, the changed subsoil conditions delayed us at least 100 days. It is our understanding, however, that we will be granted an extension of 50 days in the change order to be issued covering this additional work, being your computation of the delay in the piling only without considering its effect on the rest of the work.
>
> You will understand, of course, that this estimate does not include any of the items mentioned in the last paragraph of our letter of November 23rd referring to this same matter.

This proposal was delivered by M. E. Davis, representing plaintiffs, to the representative of the defendant at a conference in Washington, D. C., on March 5. As a result of this conference and on the same day, plaintiffs' representative submitted to defendant a revised written proposal identical with that submitted earlier in the day except that the sum specified was $3,745.47 instead of $4,208.62. The accompanying itemization was changed accordingly.

32. Between March 5 and March 14 representatives of the plaintiffs and defendant held further conferences, at which it was agreed verbally that the payment of extra costs resulting from pile driving difficulties would be increased from $3,745.47, claimed by plaintiffs in their last written proposal, to $5,597.03, and that the extension of time would be increased from 50 days claimed by plaintiffs in their last written proposal, to 75 days; that such payment and increase in time would be in settlement of the entire matter, and that no further claim would be made for delays, due to pile driving. As a result of this conference, on May 14, 1937, plaintiffs submitted another revised proposal to the contracting officer which read—

> As a result of our several conferences regarding the additional cost of the piling work at the above project due to changed subsoil conditions, we submit herewith our revised estimate of this additional cost in the sum of $5,597.03. Itemization of this estimate is attached hereto.
>
> It is our claim that in the completion of the entire work, the changed subsoil conditions delayed us at least 100 days. It is our understanding, however, that we will be granted an extension of 75 days in the change order to be issued covering this additional work, being your computation of the delay.

The attachment to said letter was as follows:

ITEMIZATION

Additional cost of driving piles due to changed subsoil conditions, which made pile driving much more difficult and reduced the efficiency of the pile driving crew—No. 740 x 15.60	$11, 544. 00
Removal of additional excavated materials due to coring certain piles instead of driving—CY 98 x 2.50	245. 00
Additional concrete placed in cored piles—CY 35 x 10.00	350. 00
Additional tests over and above those required by the specifications—No. 3 x $200.00	600. 00
Additional engineering due to the prolongation of the piling work resulting from changed subsoil conditions	400. 00
	13, 139. 00

Shells omitted from piles which were cored— L. F. 1,354 x $0.27	$365.58	
Difference between footage of piles required by plans and footage actually driven—L. F. 6,432 x $1.25	7,927.50	
		$8,293.08
		4,845.92
5% overhead		242.29
		5,088.21
10% profit		508.82
		5,597.03

Neither the letter nor the itemization referred to therein contained a reservation of further claim similar to that contained in the previous proposals.

33. As a result, defendant prepared change order "J" dated May 28, 1937, for transmittal to plaintiffs, which change order increased the contract price by $5,597.03 and extended the contract time by 75 days. Before delivering the change order to plaintiffs, and on May 29, 1937, the representative of the contracting officer wrote to plaintiffs as follows:

> In reference to your proposal in amount of $5,597.03 as submitted under date of May 14, 1937, it is requested that you submit a supplementary letter stating in effect that this proposal supersedes all former proposals in reference to this work and is to be considered a basis of settlement of this matter in its entirety.

June 1 plaintiffs replied to the defendant as follows:

> Reference is made to your letter of May 29th regarding our proposal of May 14th in the sum of $5,597.03 covering the additional cost of piling due to changed subsoil conditions at the above. It is understood and agreed that this proposal is to supersede all other proposals and is the basis for the settlement of this matter in its entirety.

Following receipt of this letter, defendant by letter of June 11 delivered change order "J" to plaintiffs, which reads as follows:

With reference to your contract dated July 11, 1936, for construction of Hospital Building #76 at Veterans' Administration Facility, Bath, New York, you are informed that owing to the following mentioned change in the work thereunder, namely:

Additional cost of driving piles due to changed subsoil conditions, which made pile driving much more difficult and reduced the efficiency of the pile driving crew—No. 740 x $15.60		$11, 544. 00
Removal of additional excavated material due to coring certain piles instead of driving—CY 98 x $2.50		245. 00
Additional concrete placed in cored piles—CY 35 x $10.00		350. 00
Additional tests over and above those required by the specifications—No. 3 x $200.00		600. 00
Additional engineering due to the prolongation of the piling work resulting from changed subsoil conditions		400. 00
		13, 139. 00
Shells omitted from piles which were cored—L. F. 1,354 x $0.27	$365. 58	
Difference between footage of piles required by plans and footage actually driven—L. F. 6,342 x $1.25	7, 927. 50	
		8, 293. 08
		4, 845. 92
5% overhead		242. 29
		5, 088. 21
10% profit		508. 82
		5, 597. 03

the contract price, in accordance with Article 3 of the general provisions of the contract, is hereby increased by the sum of Five Thousand Five Hundred Ninety Seven Dollars Three Cents ($5,597.03). On account of this change additional time of Seventy Five (75) Calendar Days is hereby granted.

The schedule of prices should be supplemented by the notation thereon of the amount, date and designating letter of this change order.

INCREASED LABOR COSTS IN CONSTRUCTION OF SUPERSTRUCTURE

34. Had plaintiffs completed the concrete footings and superstructure by January 1, 1937, as they had planned, the cost for direct labor in completing the forms, mixing and pouring concrete, and all incidental labor in connection there-

with, including erection and removal of the concrete plant, but excluding pay-roll insurance and taxes, would have been the sum of $35,363.00. The actual direct labor cost of performing the same work was $49,721.34. The actual cost was $14,358.34 greater than the cost would have been if the concrete footings and superstructure had been completed by January 1, 1937.

Pay-roll insurance and taxes (workmen's compensation and public liability insurance, social security and old-age pension) on the amount of this excess were $1,832.26, making a total of $16,190.60 for labor costs.

INCREASED LABOR COSTS IN PROTECTING CONCRETE FROM COLD

35. Plaintiffs paid a total of $2,428.61 for labor costs in protecting the concrete from cold weather during the winter of 1936–37. Had the concrete superstructure been finished by January 1, 1937, the labor costs of protecting the concrete against cold would have been $1,000. The actual cost of labor for protecting the concrete against cold was $1,428.61 greater than it would have been if the concrete superstructure had been completed by January 1, 1937.

Pay-roll insurance and taxes (workmen's compensation and public liability insurance, social security and old-age pension) on the amount of this excess were $145.58, making a total of $1,574.19 as labor cost.

The cost of fuel, kraft paper, and salt hay for winter protection after January 1, 1937, was the sum of $810.79.

The concrete work extended throughout the winter of 1936–37 and for several weeks beyond the end of the cold weather. Completion of the piling by December 31, 1936, instead of January 11, 1937, would not have reduced the extra cost due to cold weather.

RENTAL VALUE OF PLAINTIFFS' CONCRETE EQUIPMENT

36. Plaintiffs owned and used in the construction of the concrete footings and superstructure various items of equipment, such as a mixer, steel tower, concrete plant, electric

hoisting engine, and other machinery and equipment. The rental value of plaintiffs' equipment was $48.42 per day.

EXPENDITURE FOR STEAM LINE FOR TEMPORARY HEAT

37. Paragraph 22 (b) of the general conditions of the specifications provided as follows:

> The temporary heat for drying the plaster or protection of interior trim and finish may be obtained by connecting the radiators for the buildings to the present lines of the heating system at the stations at such points as designated by the superintendent. All connections shall be made by the contractor at his own expense but the necessary steam for heat will be furnished by the Government, at no expense to the contractor.

Had all the work called for by the contract been completed by the end of the original contract time, that is, October 20, 1937, there would have been no need for temporary heat for drying the plaster and protecting interior trim and finish. Because of delay in the completion of the concrete superstructure due to delay in driving piles and the resulting extension of work into the winter of 1937–38, it was necessary to have temporary heat for drying plaster and protecting interior trim and finish. The nearest point at which defendant made steam available was approximately 600 feet from the ends of the service branches extending from the building, and in order to get the heat it was necessary for plaintiffs to construct a temporary steam line for that distance and to make temporary connections with radiators at a cost of $2,160.86.

DELAY DUE TO PROJECTION OF WORK INTO RAINY WEATHER

38. The delay in pile driving had the effect of setting back the subsequent work to be performed by plaintiffs so that the outside grading, construction of roadways, and exterior painting, originally scheduled for August 1937, a dry season, could not be performed before October 1937. So many days during that month were rainy and unsuitable for such outside work, the job was delayed 17 calendar days on that account. (Change order of June 14, 1938, finding 41.)

Plaintiffs do not claim any additional direct expense on account of this delay, but include the time in their claim for increased overhead.

DELAY DUE TO DEFENDANT'S FAILURE TO FURNISH STEAM PROMPTLY

39. Defendant was unable to furnish steam required to furnish temporary heat for painting, varnishing, floor tile setting, and related interior work, as required of defendant by the specifications (Finding 37) until December 1, 1937, and, because the plaster had become so chilled in the meantime, the work could not be fully resumed, as a result of which the job was delayed 13 calendar days. (Change order of June 14, 1938, Finding 41.)

Plaintiffs do not claim any additional direct expense on account of this delay, but include the time in their claim for increased overhead.

DELAY DUE TO STRIKE

40. Painters employed on the job by plaintiffs were on strike from January 21 to January 25, 1938, inclusive, as a result of which the job was delayed 5 days. (Change order of June 14, 1938, Finding 41.) Plaintiffs make no claim on account of this delay.

EXTENSION GRANTED FOR DELAYS ON ACCOUNT OF RAINY WEATHER, LACK OF STEAM, AND STRIKE

41. June 14, 1938, defendant's contracting officer issued the following change order:

> Pursuant to the provisions of Article 9 of your contract, I have ascertained the facts and extent of the delays, and find that Change Order "J," dated May 29, 1937, granted an extension of contract time of 75 Calendar Days, to cover performance of the additional foundation work contemplated by the Change Order. This had the effect of setting back other work to be performed by you under your contract which followed the foundation work, and caused the outside grading, construction of roadways, and exterior painting originally scheduled

for August, 1937, to be rescheduled for October, 1937, a time which was found unsuitable for such work in that the number of rainy days during October, 1937, in Bath, New York, was considerably in excess of the average, and since to accomplish the outside work indicated, it was necessary to allow for a drying-out period, you were virtually stopped on outside grading, construction of roadways, and exterior painting from October 5, 1937, to October 29, 1937, during which time there was more or less continuous rainfall. This delay served to delay your contract work as a whole, 17 Calendar Days.

I find also that the specifications require a minimum temperature of 70° to be maintained in the building while setting floor tile, and varnishing and enameling are in progress. It is further provided by the specifications that you secure the required heat by connecting up the radiators for the building to the present lines of the heating system at the Facility, and that the necessary steam be furnished by the Government. It was not until the new boiler set-up, as constructed under another contract was turned on, on December 1, 1937, that sufficient steam to maintain the required temperature throughout the building could be furnished by the Government. On November 16, 1937, the lack of steam prevented you from heating the building to the required temperature, and as a consequence, you could not proceed with the painting, varnishing, tile setting, and related interior work. This condition was not remedied until December 1, 1937, and in the intervening time, the plaster had so completely chilled, it was not until after December 3, 1937, that the painting could be fully resumed. The delays cited served to delay the entire work under your contract 13 Calendar Days.

It is my further finding that painters employed in connection with your contract, went on a strike on January 21, 1938, and that the strike ended on January 25, 1938. The status of your contract at the time of the strike was such that it served to delay the contract work as a whole, 5 Calendar Days.

In view of the foregoing findings that your contract work as a whole was delayed 17 Calendar Days due to unusually rainy weather during October, 1937, 13 Calendar Days due to the Government's inability to furnish steam for the heating of the building, and 5 Calendar Days occasioned by a strike of the painters on January 21, 1938, or a total of 35 Calendar Days, your contract time is hereby extended 35 Calendar Days.

DELAY DUE TO EXTRA EXCAVATION

42. Plaintiffs performed certain additional excavation, and were given additional pay and granted a 6-day extension of time therefor by a change order dated March 15, 1938.

Similarly, plaintiffs performed certain additional rock excavation and were given additional pay and granted a 6-day extension of time therefor by a change order dated April 22, 1938.

No claim is made with reference to these two items of delay.

SUMMARY OF DELAYS

43. Completion of the contract here involved was delayed 122 days beyond the time within which plaintiffs would have completed the contract except for delays hereinabove set forth. The time lost attributable to these delays was as follows:

	Days
(*a*) Time lost in driving piles due to unanticipated subsoil conditions and to methods imposed upon plaintiffs by defendant in meeting such conditions, and resultant delay in subsequent work [Included in change order "J," Finding 33]	64
(*b*) Time lost because of break-downs and repairs to plaintiffs' machinery, rain and snow, and erroneously estimated time for moving equipment [Included in change order "J," Finding 33]	11
(*c*) Time lost because of rainy weather encountered as a result of the delay due to subsoil conditions mentioned in Item (*a*) [Change order of June 14, 1938, Finding 41]	17
(*d*) Time lost in setting tile, varnishing, painting, and related interior work due to failure on the part of defendant to furnish heat [Change order of June 14, 1938, Finding 41]	13
(*e*) Time lost by reason of a painters' strike [Change order of June 14, 1938, Finding 41]	5
(*f*) Additional time required for extra excavations [Change order of March 15, 1938, Finding 42]	6
(*g*) Additional time required for extra rock excavations [Change order of April 22, 1938, Finding 42]	6
Total	122

Plaintiffs disclaim any demand for compensation for the 17 days of delay specified in Items (*e*), (*f*), and (*g*), *supra*.

FIELD OVERHEAD

44. The daily overhead cost in the field, exclusive of general office overhead, to plaintiffs during the period of the delay mentioned in Item (*d*) of Finding 43, was as follows:

Field staff salaries	$31.57
Workmen's compensation on field staff	1.42
Public liability insurance on field staff	.144
Social security and old-age benefits for field staff	.78
Photographs	.18
Telephone charges	1.18
Fire insurance	1.58
Travel expense	1.98
Total	38.834
Total for 13 days	504.84

GENERAL OFFICE OVERHEAD

45. The amount of loss suffered by plaintiffs on account of general office overhead during the 13-day delay cannot be determined with mathematical precision. Taking all the facts and circumstances into consideration, the plaintiffs suffered a loss in the amount of $325.00.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

By a contract with the Veterans' Administration the plaintiffs undertook the construction of a hospital building at Bath, New York. It was an undertaking involving a consideration of $741,800.

The major claim is for excess costs, arising through an allegedly unwarranted prolongation of the time of performance.

Performance was in fact delayed because of difficulties encountered in driving satisfactory piling for the foundations. Actual driving of the piles uncovered subsurface conditions not hitherto known. The specifications described the type of pile to be used, and the routine of driving the pile. The specified pile was not suitable throughout the area for the underground conditions met with. In many

instances another type of pile was substituted by the defendant's order. The conditions varied, giving rise to variations in type of pile and the installation of it in the ground. The footage of the piles was materially reduced—they were shorter than planned—and this reduced the estimated price for the pile-driving.

These difficulties delayed the work and affected the plaintiffs' costs. Negotiations were undertaken between the parties looking to a financial settlement for the pile driving. They agreed upon $5,597.03 and an extension of contract time by 75 days. The defendant insisted upon, and the plaintiffs in writing gave the assurance: "It is understood and agreed that this proposal [$5,597.03 and 75 days' extension] is to supersede all other proposals and is the basis for the settlement of this matter in its entirety." The plaintiffs had been claiming "additional costs on the entire contract" due to the changed subsoil conditions. Claims had been submitted by them for sums less than $5,597.03 and less than 75 days' extension, but they asserted in addition a right to damages for the delay incident to the changes in piling.

The formal order embodying the change in piles and their method of placement, increased the contract price by $5,597.03, and extended the contract time for performance by 75 calendar days. This order was accepted by the plaintiffs as "the basis for the settlement of this matter in its entirety." It is immaterial that the 75 additional days so granted may not have been the precise period of delayed completion. In granting this extension the contracting officer was entitled to take into consideration the human factors of diligence and dilatoriness and other relevant matters. The change order in fact does not find that completion of the contract was delayed by 75 days. It merely extends the time of performance by that many days.

A change in work may increase or decrease the period of performance. Here it did increase the period of performance and plaintiffs have been compensated therefor under the procedure authorized by the agreement they entered into. They are not entitled to more.

We have here no actionable breach of contract, and whatever extra expense the plaintiffs incurred must be held to have been covered by the increase in contract price and time, and the acceptance thereof as a settlement of the matter in its "entirety." The word "entirety" is not a word of limitation and may not be so construed as to keep the claim alive.

In addition to indirect labor costs includible in field overhead, the plaintiffs claim an increase in cost of direct labor on concrete structure, due to the lengthening out of the period of performance, caused by the difficulties in attaining satisfactory piling. But the adjustments necessary to be made to meet unforeseen subsoil conditions, were no breach of the contract. They were authorized by the contract. They were made and they were paid for. There was nowhere a warranty by the defendant that its changes in the contract work would be so fitted into seasonal conditions as to permit the plaintiffs to conclude their concrete work before winter set in. Authorized changes increasing work may increase the necessary time to perform the work. This was a simple fact, easily understood by both parties when they entered into their contract.

Shifting of the period of performance may project what would otherwise be summer work into the winter, winter into the summer, dry weather into rainy weather, and vice versa. But if the shifting is due to authorized changes, the shifting itself is authorized and cannot be considered a breach.

The plaintiffs claim the extra expense of making connections with defendant's plant for temporary heat, due to the plastering being thrown into winter weather, another consequence of the delay in pile driving. It follows from what has been said that this item cannot form the basis of a recovery.

Nor can recovery be had for retardation of the work due to extension of performance into rainy weather, also flowing from the initial delay in the driving of piles. As has been said, the change made in the pile driving, due to unforeseen subsoil conditions, is not a breach, but authorized by the very terms of the contract.

The plaintiffs are entitled to their damages due to failure of the defendant to furnish agreed temporary heat for painting, varnishing, floor tile setting, and related interior work. Here was an unfulfilled obligation of the defendant, and the plaintiffs may recover their overhead for the delay period of 13 calendar days. See Finding No. 39. Field overhead for 13 days at the rate of $38.834 per day (see Finding No. 44) is $504.84, which is recoverable.

The evidence is not sufficient to establish with mathematical accuracy an apportionment of general office overhead to this period of 13 days' delay. It is found, however, that the sum of $325.00 is apportionable from general office overhead to this 13 days' delay on this particular contract of the plaintiffs, and this is added to the amount of recoverable field overhead of $504.84, making a total of $829.84.

Plaintiffs are entitled to recover $829.84. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

EDWIN L. WIEGAND COMPANY v. THE UNITED STATES

[No. 45664. Decided May 7, 1945]

On the Proofs

Income tax; gross income; purchase and sale by corporation of own stock.—Where corporation, plaintiff, in 1933, purchased 20 shares of its own stock, at a price of $1,500, and in 1937 reissued and sold, but not as an original issue, the 20 shares at a price of $3,600; it is *held* that the transaction, involving a profit to plaintiff, gave rise to taxable income under Section 22 of the Revenue Act of 1936, as interpreted by Regulations 94, article 22 (a)–16, first adopted and promulgated May 2, 1934 as T. D. 4430 (XXXI–1 C. B. 36), which held that a gain derived by a corporation from purchase and sale of its own stock constituted taxable income, and plaintiff is not entitled to recover.

Same; reenactment of statutory provisions; amendment of Treasury Regulations as result of court decision.—The pertinent provisions of section 22, Revenue Act of 1936, applicable to the

instant case, have been in effect unchanged under all revenue acts since the adoption of the Sixteenth Amendment, and are in effect at the present time, but the Treasury Regulations interpreting the section, made under the Revenue Act of 1918, and in effect from 1920 until May 2, 1934, were amended as the result of the decision of the court in *Commissioner* v. *Woods*, 57 Fed. (2d) 635; certiorari denied 287 U. S. 613; and the amended regulations have ever since had Congressional acquiescence and approval of Article 22 (a)-16 through continuance of the identical broad provisions of Section 22 (a) in subsequent income tax enactments, and by judicial application of the pertinent Article in cases similar to the instant suit. *Commissioner* v. *Air Reduction Co., Inc.*, 130 Fed. (2d) 145, and other cases cited.

Same; contentions of plaintiff considered in light of court decisions.—The contentions advanced by plaintiff in the instant case that the regulation in question does not apply because plaintiff was not engaged in dealing in its own stock; that if the gain is taxable the taxable portion must be limited to the difference, if any, between the selling price and the fair market value of the stock on October 19, 1936; and that the amended regulation applied prospectively is invalid because it changes without statutory authority an interpretation of long standing, were considered and rejected in certain of the cases cited. See also *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 99, and *Helvering* v. *Reynolds*, 313 U. S. 428, as to the argument that the Commissioner was not authorized to change the regulation.

The Reporter's statement of the case:

Mr. Harry Friedman for plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Mr. Fred K. Dyar* on the brief.

Plaintiff seeks to recover $803.43, with interest, alleged overpayment of income tax for the fiscal year ending June 30, 1937, on the ground that defendant erroneously and illegally included as taxable income or profit the amount of $2,100, representing the difference between the amount of $3,600, for which plaintiff issued and sold (not as an original issue) twenty shares of its own capital stock during the taxable year; and the amount of $1,500 at which it had purchased such twenty shares of stock in 1933. Plaintiff's position is in substance that this was a capital trans-

action and since plaintiff was not engaged in dealing in its own shares as it might in the shares of other corporations the acquisition of these twenty shares in 1933 and the resale thereof in 1936 did not give rise to a taxable gain under section 22, Revenue Act of 1936 (49 Stat. 1648)—the provisions of which section are the same as the corresponding sections of all prior and subsequent income tax statutes.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. September 18, 1937, plaintiff, a Pennsylvania corporation with principal office at Pittsburgh, filed a tentative income and excess profits tax return for the fiscal year ending June 30, 1937 (hereinafter referred to as 1937), and on December 15 filed its completed return showing an excess profits tax of $12,302.12 and a normal and surtax of $83,-243.88. Subsequently, in December 1938 it prepared and filed in connection with a claim for refund an amended return for 1937 showing a profits tax of $11,509.27 and a total normal and surtax of $81,358.60. Plaintiff attached to this return a statement in which it asserted that an item of $7,000 in line 10, page 2, of the original completed return was erroneous and should not have appeared thereon; also, that an item of $44,282.18 in line 20, page 20, of that return was overstated by $392.89; and further stated that as a result of these two errors the tax for 1937 had been overpaid in the amount of $2,678.13. The total tax of $95,546 shown on the original return was paid in five installments, the last installment payment of $23,886.50 being June 18, 1938.

2. December 17, 1938, plaintiff filed a formal claim for refund of $2,678.13 for 1937, and set forth therein, as grounds, a statement that the claimed refund resulted from the erroneous inclusion upon plaintiff's return of an item of $7,000 as income collected under a royalty agreement which had been in effect over a period of years, first believed to include the taxable year but later discovered not to have been in effect during the fiscal year 1937.

September 5, 1940, the Commissioner notified plaintiff that its claim for refund had been allowed in part and dis-

allowed to the extent not previously allowed. The overpayment so allowed in August was $1,874.70, and this sum, together with accrued interest thereon of $236.19, was paid plaintiff August 21, 1940.

In arriving at this overpayment of $1,875.70 the Commissioner first increased the net income originally reported by $2,100 which he determined to represent a taxable gain or profit to plaintiff on the sale in the taxable year of twenty shares of its own capital stock, as hereinafter mentioned. This had the effect of reducing the amount which would otherwise have been refundable as an overpayment by $803.43.

3. August 30, 1940, plaintiff filed another claim which it called an amended claim for refund for $803.43 for 1937. This claim contained the following statement:

> Under date of December 17, 1938, your petitioner corporation filed a claim for refund of overpayment of income tax for the fiscal year ended June 30, 1937, in amount of $2,678.13 based upon overstatement of royalty income for that year. The Commissioner upon examination of the claim proposes to allow only $1,874.70, contending that there should be offset as additional taxable income the sum of $2,100.00, representing alleged gain on the sale of treasury stock. Your petitioner corporation contends that such gain does not constitute taxable income under the applicable law and regulations and respectfully requests that refund be made not only of the $1,874.70 now proposed but also of the additional $803.43 which is being denied by reason of the treasury stock transaction.

December 16, 1941, the Commissioner notified plaintiff that its claim for $803.43 "is considered an application for reconsideration of the original claim in the amount of $2,678.13, which was partially disallowed, registered notice having been mailed to the taxpayer on September 5, 1940. * * * In view of the foregoing, the Form 843 will not be formally rejected, and no official rejection notice will be issued."

4. The alleged gain on the sale of Treasury stock arose under the following circumstances:

W. H. Snead, an employee of plaintiff, became one of its stockholders in 1929, holding twenty shares of $100 par

stock (hereinafter referred to as par stock) and eighty shares of no par stock. At that time there were outstanding 1,000 shares of par stock and 4,000 shares of no par stock. The majority stockholder was Edwin L. Wiegand, founder and president and general manager of the company. Prior to October 19, 1936, all stock was held by those directly connected with the company, the company's policy being to have employees participate by holding shares of stock. The stock was closely held and was not traded or quoted on any exchange.

The stockholders had their holdings each in the ratio of four shares of no par stock to one share of par stock, except in isolated instances not here material.

Snead's connection with the company was severed in 1933, and at the time of severance the company bought his holding of twenty shares of par stock, Snead disposing of his no par stock to Wiegand.

At the time of his purchase Snead paid the company par for the twenty shares, a total of $2,000. They were transferred back to the company May 26, 1933, and the consideration paid therefor was $1,500. The transaction was treated as the acquisition of Treasury stock and so recorded on the company's books.

The transaction in which the stock was acquired from Snead was the only transaction by plaintiff in its own stock from the date of incorporation in 1924 to the date of the hearing in 1943.

5. The taxpayer from time to time invested its surplus funds in marketable securities and had an account on its books for such investments. The twenty shares of stock acquired from Snead was not carried in the investment account, but in a separate Treasury stock account. On the financial statements the Treasury stock was shown as a reduction from capital stock rather than as an investment. This accounting treatment of the transaction accords with good accounting practice.

Plaintiff did not purchase the stock from Snead because it was engaged in the business of dealing in its own stock,

but such stock was acquired because Snead was leaving the employ of the company.

No attempt was ever made to resell the stock acquired from Snead to outsiders.

6. In preparation for a plan for recapitalization which later took place October 20, 1936, plaintiff on October 19, transferred to Edwin L. Wiegand the twenty shares of Treasury stock so held, and the consideration paid by Wiegand for this transfer was $3,600 in cash. This placed Wiegand's holdings as to par stock and no par stock in the same relative proportion as the other stockholders, that is to say, one share of par stock to four shares of no par stock.

The difference of $2,100 between the price at which the stock was sold by Snead to plaintiff and the price at which sold by the company to Wiegand, was included by the Commissioner of Internal Revenue as taxable profit for the fiscal year 1937, and if that sum be eliminated as taxable income plaintiff's tax for that year would be diminished by $803.43.

7. On the company's books this difference of $2,100 was treated as an appreciation in value of the shares from the time they were acquired by the company from Snead to the time they were sold to Wiegand.

The amount of $3,600 received from Wiegand was disposed of on the company's books by crediting $2,000 to the Treasury stock account and crediting $1,600 to the capital surplus account. The company's cash account was charged with the full $3,600.

The consideration of $1,500 to Snead had been handled on the books by debiting $2,000 to the Treasury stock account, crediting $1,500 to the cash and/or note account, and crediting $500 to the capital surplus account.

By the two accounting transactions the capital surplus account was credited with a total of $2,100, and the book profit was unaffected.

The values represented by the stock transactions were those placed by the company on its own stock on May 26, 1933, and October 19, 1936, and there is no evidence of other values.

When a certificate of stock was turned in to the company it was canceled, and any reissue was covered by a new certificate.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The question presented in this case is whether under the provisions of sec. 22 of the Revenue Act of 1936 (49 Stat. 1648, 1657), continued unchanged in all subsequent taxing acts and in Regulations 94, art. 22 (a)-16, first adopted and promulgated May 2, 1934 in T. D. 4430 (XIII-1 C. B. 36), a gain of $2,100 derived by a corporation on the transfer or sale by it for $3,600 of certain shares of its own stock (not as an original issue) which it had previously acquired or purchased at $1,500, should be regarded as taxable income, or whether such a purchase and sale should be treated as a capital transaction giving rise to neither taxable gain nor deductible loss.

The Commissioner of Internal Revenue held that the excess of the sale price over the purchase price was taxable income to plaintiff in 1927, and defendant insists that this decision was correct and legal. Plaintiff takes the position that this excess of $2,100 represented capital paid in for stock and was not, therefore, taxable income within the meaning of the Sixteenth Amendment to the Constitution and sec. 22, *supra;* that art. 22 (a)-16, Regs. 94, does not apply because plaintiff was not engaged in "dealing in its own shares as it might in the shares of another corporation," and that, if the regulation does apply to a single transaction, it is invalid.

The pertinent provisions of sec. 22, Revenue Act of 1936, applicable to the case, have been in effect unchanged under all revenue acts since the adoption of the Sixteenth Amendment, and are in effect at the present time. These provisions are as follows:

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind

> and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

The Treasury regulations in effect from 1920, made under the Revenue Act of 1918, until May 2, 1934, provided (art. 542, Reg. 45) that "If, * * * for any * * * purpose, the stockholders donate or return to the corporation to be resold by it certain shares of stock of the company previously issued to them, or if the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered a capital transaction and the proceeds of such sale will be treated as capital and will not constitute income of the corporation. A corporation realizes no gain or loss from the purchase of its own stock. See articles 563, 861, and 862." The last-quoted sentence was changed in 1924 by art. 543, Reg. 65, to read: "A corporation realizes no gain or loss from the purchase or sale of its own stock."

The amended regulation of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, promulgated May 2, 1934, and ever since continued (art. 22 (a)–16, Reg. 94, *supra*), provides as follows:

> ART. 22. (a)–16. *Acquisition or disposition by a corporation of its own capital stock.*—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.
>
> But if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner

> as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Act.

The occasion for the adoption of the above-quoted regulation modifying the regulations previously existing, and as contained in art. 543, Reg. 65, *supra*, and corresponding articles in Regs. 69, 74, and 77, appears to have been the opinion of the court in *Commissioner* v. *A. S. Woods Machine Co.*, 57 Fed. (2) 635, 636, decided April 2, 1932, certiorari denied 287 U. S. 613. In that case the Woods Company had obtained a decree of patent infringement against the Yates Machine Company, which owned stock in the Woods Company. The parties settled the controversy as to damages and in connection therewith the Yates Company transferred to the Woods Company, with other considerations, 1,022 shares of the stock of the Woods Co., for $433,200.04. For these considerations the Woods Company acknowledged satisfaction of its rights under the decree of infringement. After the receipt of the stock the Woods Company, by corporate action, retired it, thereby reducing its capital stock from 3,000 to 1,978 shares. The Treasury held that the value of the stock so received by the Woods Company was taxable income to it, and the Board of Tax Appeals, now the Tax Court, reversed the decision and held in accordance with its prior decisions that a "corporation realizes no gain or loss from the purchase or sale of its own stock." The Court of Appeals reversed the Board and, after quoting art. 543, Reg. 65, said, at p. 636, that "Whether the acquisition or sale by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction involved. * * * If it was in fact a capital transaction, i. e., if the shares were acquired or parted with in connection with a readjustment of the capital structure of the corporation, the

Board rule applies. * * * But where the transaction is not of that character, and a corporation has legally dealt in its own stock as it might in the shares of another corporation, and in so doing has made a gain or suffered a loss, we perceive no sufficient reason why the gain or loss should not be taken into account in computing the taxable income. The view taken by the Board of Tax Appeals (see *Houston Brothers Co.* v. *Commissioner*, 21 B. T. A. 804) presses accounting theory too far in disregard of plain facts. * * *. In *Knickerbocker Imp. Co.* v. *Board of Assessors*, 74 N. J. Law, 583, 585, 65 A. 913, 915, 7 L. R. A. (N. S.) 885, the plaintiff corporation was held liable for the franchise tax on its own stock which it had bought and held in its treasury. The court said: 'Stock once issued is and remains outstanding until retired and canceled by the method provided by statute for the retirement and cancellation of capital stock.' "

After the promulgation in 1934 of the new regulation above quoted, the Commissioner of Internal Revenue applied it not only prospectively but sought to apply it in the decision of cases involving such transactions concluded in taxable years prior to its adoption and promulgation. Two of such cases were *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, involving 1929, and *First Chrold Corp.* v. *Commissioner*, 306 U. S. 117, involving 1933. The court in the opinion in the *Reynolds Company* case refused to permit a retroactive application of the changed or amended regulation to a sale by the corporation of treasury stock in 1929 at a profit, and after holding (p. 114), that the language of the statute defining gross income was "so general in its terms as to render an interpretative regulation appropriate," said pp. 114, 115:

> The administrative construction embodied in the regulation has, since at least 1920, been uniform with respect to each of the revenue acts from that of 1913 to that of 1932, as evidenced by Treasury rulings and regulations, and decisions of the Board of Tax Appeals. In the meantime successive revenue acts have reenacted, without alteration, the definition of gross income as it stood in the acts of 1913, 1916, and 1918. Under the

established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.

Accordingly the court held that the "tax liability for the year 1929 is to be determined in conformity with the regulation then in force." The court, however, refused to decide the question as to whether the amended and changed regulation might properly be applied to a similar sale consummated after the amended regulation became effective and, at pp. 116 and 117, said:

> Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed. We need not now determine whether, as has been suggested, the alteration of the existing rule, even for the future, requires a legislative declaration or may be shown by reenactment of the statutory provision unaltered after a change in the applicable regulation. As the petitioner [Helvering] points out, Congress has, in the Revenue Acts of 1936 and 1938, retained § 22 (a) of the 1928 Act *in haec verba*. From this it is argued that Congress has approved the amended regulation. It may be that by the passage of the Revenue Act of 1936 the Treasury was authorized thereafter to apply the regulation in its amended form. But we have no occasion to decide this question since we are of opinion that the reenactment of the section, without more, does not amount to sanction of retroactive enforcement of the amendment, in the teeth of the former regulation which received Congressional approval, by the passage of successive Revenue Acts including that of 1928.

Since, as the Supreme Court held, the language of the statutes defining taxable gross income is "so general in its terms as to render an interpretative regulation appropriate," the rule of reasonableness and Congressional approval by ratification of administrative interpretation and application, as applied in the *Reynolds Company* case, gives equal support to the validity of the amended regulation, applied prospectively, as a modification or reversal of the prior regulation as to cases such as we have here. Although the

court in the *Reynolds* case declined to pass upon the question here presented, because it was not there involved, it apparently recognized the force of the argument here made as to Congressional approval of the amended regulation as applied to stock sales made after its adoption in the statement that "It may be that by the passage of the Revenue Act of 1936 the Treasury was authorized thereafter to apply the regulation in its amended form." The Revenue Act of 1938, effective May 28, 1938 (52 Stat. 447), also reenacted without change sec. 22 defining gross income, and the provisions of that section remained unchanged in the enactments of the amendatory Revenue Act of 1939 (53 Stat. 862), the first and second Revenue Acts of 1940 (54 Stat. 615 and 54 Stat. 974), the Revenue Act of 1941 (55 Stat. 687), the Revenue Act of 1942 (56 Stat. 798), and the Revenue Act of 1943 (57 Stat. 126).

In view of this apparent Congressional acquiescence and approval of the interpretation of Section 22 by the amended regulation that a gain derived by a corporation from the purchase and sale of its stock constitutes taxable income, and in view of the decisions of the courts in cases decided under this regulation subsequent to the decision in the *Reynolds Tobacco Co.* case, *supra*, we are of opinion that defendant properly taxed plaintiff on the gain of $2,100 derived from the sale of the twenty shares of its own stock in 1936. The amended regulation of May 2, 1934, has been upheld and applied, in cases like the one here under consideration, in *Commissioner* v. *Air Reduction Co., Inc.*, 130 Fed. (2d) 145; *Helvering* v. *Edison Bros. Stores, Inc.*, 133 Fed. (2d) 575; *Brown Shoe Co., Inc.* v. *Commissioner*, 1933 Fed. (2d) 582; *United States* v. *Stern Bros & Co.*, 136 Fed. (2d) 488; *Allen* v. *National Manufacture & Stores Corp.*, 125 Fed. (2d) 239; *Trinity Corp.* v. *Commissioner*, 127 Fed. (2d) 604; *Dow Chemical Co.* v. *Kavanagh*, 139 Fed. (2d) 42; *Superheater Co.* v. *Commissioner*, 1943 P–H. Tax Court Memorandum Decisions Service, paragraph 43,128, and *Aviation Capital, Inc.*, v. *William J. Pedrick*, C. C. H., 1945, par. 9,219. See also, *American Chicle Co.* v. *U. S.*, 94 C. Cls. 699, 710–711, affirmed 316 U. S. 454, 455.

The other arguments made by plaintiff that the regulation

does not apply to the instant case because plaintiff was not engaged in dealing in its own stock; that if the gain of $2,100 is taxable the taxable portion must be limited to the difference, if any, between the selling price of $3,600 and the fair market value of the stock on October 19, 1936, and that the amended regulation applied prospectively is invalid because it changes without statutory authority an interpretation of long standing, were considered and rejected in certain of the cases above cited. See, also, *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 99–103, and *Helvering* v. *Reynolds*, 313 U. S. 428, 431, 432, as to the last-mentioned argument that the Commissioner was not authorized to change the regulation.

Plaintiff is not entitled to recover and the petition is therefore dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

S. J. GROVES AND SONS COMPANY, A MINNESOTA CORPORATION, v. THE UNITED STATES

[No. 45263. Decided May 7, 1945]

On the Proofs

Government contract; damages claimed due to alleged delays by Government; insufficient proof.—Where plaintiff contracted with the Government to construct a dam, furnishing all labor and materials and performing all work; and where plaintiff claims damages due to alleged unreasonable delays to itself and its subcontractor chargeable to defendant, caused by late delivery of plans, discovery of quicksand, the development of honeycombing, the inavailability of reinforcing steel when needed and the making of errors in the cutting of steel which was to be furnished by the Government; it is *held* that no breach of the contract had occurred and where breach might be inferred there was not sufficient proof of the extent of extra work and expense incurred, since the defendant had diligently solved difficulties as they arose; the plans were perfected within a reasonable time; and plaintiff's workmen were kept busy on other parts of the project during the short, indefinite periods of delay.

The Reporter's statement of the case:

Mr. Arthur J. Phelan for the plaintiff. *Mr. Joseph J. Cotter* and *Hogan & Hartson* were on the brief.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Minnesota, and for many years has been engaged as a contractor in the construction of dams, bridges, highways, tunnels, sanitation works, and so forth.

2. Matt S. Ross is the subcontractor of the plaintiff and for whom plaintiff is seeking recovery in addition to the compensation plaintiff is claiming for itself.

3. On November 12, 1935, defendant, through its Bureau of Reclamation, issued invitations to bid for a contract to furnish all labor and materials and to perform all work for the construction of Bull Lake Dam, Riverton Project, Wyoming. Pursuant to said invitation for bids, plaintiff submitted a proposal to perform the work for the sum of $653,397.50 and this bid was accepted and formal contract No. 12–r–5572 was entered into December 31, 1935. Copies of the contract, specifications and drawings have been introduced in evidence as plaintiff's Exhibit 2 and by reference are made a part hereof.

The contract provided that work was to be commenced within thirty calendar days after receipt of notice to proceed and to be completed within 700 days from receipt of such notice. Plaintiff received notice to proceed February 24, 1936, by notice dated February 19, 1936, thus establishing the date of completion as January 24, 1938. By order for changes No. 1, dated September 23, 1936, the time required for performance of the contract was extended for 120 days, thus making the time for completion of the work May 24, 1938. On January 3, 1938, because of low temperatures and other severe weather conditions, defendant directed plaintiff to suspend all construction work until further notice. By letter dated March 23, 1938, plaintiff was directed to resume work effective April 15, 1938. The period of this suspended work

was 101 calendar days. Plaintiff completed its work under contract July 22, 1938, and was paid $649,414.21, the full contract price together with extras provided by orders for changes.

Article 3 of the contract provided that the contracting officer might change the drawings or specifications, within the general scope of the contract, and for such a change should, in writing, equitably adjust the contract. Article 4 provided that changes in drawings or specifications should be made by the contracting officer to meet subsurface or latent conditions materially different from those shown on the drawings or indicated in the specifications. Article 9 provided for liquidated damages for delay by the contractor, not due to unforeseeable causes beyond his control and without his fault or negligence.

All liquidated damages were remitted, and the plaintiff is not charged with any liquidated damages for delay.

4. Plaintiff is suing for damages it claims it suffered through alleged delays caused by defendant.

5. Plaintiff's contract was for the construction of an earth filled dam with appurtenant concrete structures. The earth embankment work was performed entirely by plaintiff's subcontractor, Matt S. Ross, and the concrete work was performed by plaintiff itself. The axis of the dam extended generally in a north and south direction, a distance of approximately 3,400 feet. A concrete spillway and stilling basin 100 feet in width was placed across the dam slightly north of the center of the dam. The spillway was provided with taintor gates and was spanned by a bridge. Beneath the embankment and approximately 200 feet north of the spillway was another concrete structure known as the conduit. At its upstream intake end a trash rack prevented debris from entering the conduit and at its downstream end was a stilling basin. Between the trash rack and the stilling basin and approximately under the axis of the dam were gates capable of shutting off the flow of water through the conduit, which gates were operated from a control house built atop the dam. Extending along the entire axis of the dam was a concrete parapet wall.

6. The drawings were general and in connection with certain phases of the work, especially concrete work, it was necessary for the defendant to furnish plaintiff with detailed drawings showing exactly how reinforcing steel was to be placed and how certain connections would be made. One of the drawings was a tentative construction program which indicated that concrete in the conduit would be placed between the first of September and the middle of November. This program was only tentative for the assistance of bidders in preparing their own construction program.

7. The specifications further provided:

> * * * Within 60 calendar days after date of receipt of notice to proceed the contractor shall furnish the contracting officer a complete construction program showing in detail his proposed program of operations. Revised construction programs shall be submitted by the contractor at intervals of not more than six months and in addition thereto the contractor shall immediately advise the contracting officer of any proposed changes in his construction program.

The specifications also provided that materials, including steel sheet-piling, cement, and reinforcing steel for use in the project would be furnished by the defendant. The contractor was required to give the contracting officer thirty days' notice of its requirements for desired cement.

8. A contract was entered into by plaintiff with Matt S. Ross on February 19, 1936, covering the excavating and grading items on the job. Plaintiff performed all structural and concrete work. About January 1, 1936, plaintiff began the preliminary work of moving in and unloading equipment, and arranging quarters for its supervisory force and workmen, including a camp, the location of this project being 40 to 45 miles from Riverton, Wyoming, the nearest town.

9. February 14, 1936, H. D. Comstock, defendant's superintendent on the project, wrote the plaintiff concerning a change in specifications as follows:

> Reference is made to our conversation this noon regarding the change in method of construction at the point where the gates in the outlet conduit of Bull Lake dam will be located. For your information I quote the

following from the letter from our Chief Engineer which I showed you:

"Reference is made to specification drawing No. 36–D–197, entitled 'Outlet Works, General Plan and Sections.' It will be noted in the gate chamber details that a two stage construction schedule was contemplated below Elevation 5,748.0. The first stage is the outer shell and the second stage the actual installation of gates, gate liners and tunnel plug.

"Further study has demonstrated that the complications of such design and construction are not warranted by the negligible increase in diversion capacity. It is therefore intended to build this part of the structure in one stage with gates, liners, etc., installed and construction drawings are being prepared on this basis."

10. Plaintiff planned to commence construction work on the outlet conduit by April 1, 1936, and to begin pouring concrete by April 15, 1936. On March 14, 1936, plaintiff transmitted to defendant its progress schedule with a letter reading as follows:

Herewith two copies of our construction program for the Bull Lake dam as per your request and our estimates at this time. The chart we are submitting has been altered to conform with changes in plain and design of the conduit gates as per letter from Mr. Comstock under date of February 14 and the information that the gates will not be available until early in August.

We now plan to start right away on the excavation at the upper end of the spillway, carry same to the south of station 2 on spillway stationing and go ahead with the steel and concrete work, including gates and highway bridge if material for this portion of the work will be available and the plan is approved.

It is the intention to start the grading operations south of station 16 (axis of dam stationing), that is to start building the embankments on that portion. If this is approved and carried out the pipe drains under these embankments and the portion of the spillway floor we can work in, will be needed at an early date.

It is hoped that the attached charts meet with your desires and that the program outlined meets with your approval and conforms to your shipping schedules.

Plaintiff and defendant's resident engineer cooperated in preparing plaintiff's construction program.

The defendant, upon receipt of plaintiff's proposed progress schedule, proceeded to make changes in its drawings conformable thereto and to order materials to the project, according to section 25 of the specifications; also to prepare the necessary detail plans of the conduit for plaintiff without which plaintiff would be unable to proceed. These plans were delivered to plaintiff April 13, 1936. Subsequent to plantiff's letter to defendant of March 14, transmitting its proposed schedule and prior to receipt of plans of April 13, 1936, plaintiff's representatives had continuously urged the defendant to expedite the plans and material so that the work upon the project might proceed.

Plaintiff had such of its equipment on the project as was necessary to proceed with the work according to its program on April 1, 1936, and also its supervisory and other personnel. During this period of delay plaintiff kept its supervisory and other personnel on the project because of the isolated location of the project and difficulty of replacing them. The men were kept occupied with other work on the project, such as fixing up a shower bath, making some changes in camp buildings, etc. On or about March 14, 1936, Mr. Jones, plaintiff's representative on the site, desired to go to the Reclamation headquarters office at Denver for the purpose of trying to have plans and materials expedited, which plan was concurred in by Mr. Comstock, defendant's superintendent, but upon objection of Mr. Smith, defendant's resident engineer, the trip was not taken.

11. Under date of March 22, 1936, plaintiff wrote the defendant as follows:

> Relative to conversation with Mr. Smyth today asking for a further break-down of Item 26 "Concrete in Outlet Works stilling basin, and in spillway, except gate structure" with reference to construction program submitted by this office on March 14th. It is hoped that we can place concrete in the outlet works conduit starting about, or not later than April 15th. We would like to get in the outlet works intake and trashrack structure, or in other words, the upper end of the conduit and four sections of the conduit barrel on the upper end before high water this spring.
>
> We would also like to get started on the upper end of the spillway and construct it through complete to

about Sta. 2+00 (Spillway Stationing), then leave a gap in the excavation for a roadway crossing over the spillway, and continue on below the roadway plug omitted in the excavation. The stilling basins of both spillway and conduit we now intend to let go until after high water, although it was our original intention to complete the conduit before high water. The change in plans and delay of delivery on gates and conduit liners makes this change in program necessary.

We would appreciate knowing what delivery dates will be on materials, steel, structural steel and all items involved as it is difficult to decide definitely on a program until these dates are known, or to know how to organize. We have our organization on the ground and are anxious to keep them busy if material shipment schedules will permit.

If material involved can be expected in time to permit it, we will be wanting our first cement on April 15th, but we do not want to get the cement here and be hung up on other materials so that we cannot make use of it.

It is hoped that this letter gives the information desired and that we may be advised at as early a date as possible on the shipping schedule of reinforcing steel, highway bridge steel, gate steel, trashrack hardware and fittings and other materials involved. * * *

Under date of April 6, 1936, plaintiff wrote the defendant, stating, in part:

When we submitted our program on Mar. 14th we asked about shipping schedules, again on March 22nd we requested information and we have made daily verbal inquiries. All we have learned to date is embodied in a copy of Specifications No. 677 "Invitation for Bids, Schedules, Specifications and Drawings—Pier Noses and High Pressure gates for Outlet Works" and a verbal report that plans revised for the conduit should have been received and were promised for last week, but up to this writing, have not arrived.

Specifications No. 677 call for bids Apr. 25, allow 160 days for delivery of material, all of which indicates that, under the change in method of construction (Mr. Comstock's letter of Feb. 14th) the conduit cannot be completed before the latter part of November, about which date, if not before, it is probable that grading work will be stopped on account of frosty weather. The letter of February 14th referred specifically and only to a change in plans "at the point where the gates in the

outlet conduit of the Bull Lake Dam will be located." It is just recently that I learned that the entire outlet conduit will be redesigned. And how much else of the structure may be redesigned I do not know. It is felt that we should be fully advised.

We received notice to proceed, effective, I assume on Feb. 24, as that was the date the letter received at our home office in Minneapolis, and we have made all possible efforts to fully comply. We paid a premium to dig snow for the release of equipment and transportation of same to the job, we transported men the forty-odd miles in below zero weather to get up accommodations for a crew, we shipped in a supervisory staff and are now paying out several thousand dollars a month and waiting to find out when and where we can go ahead with the structure work.

We can go ahead with some of the grading work but, as outlined above, and for the reasons set forth it appears that our grading operations are practically limited to the South side of the river for this entire season, and this means, in embankment figures, about 225,000 yds. of dirt and the rock fill that goes with it. If this is prosecuted with the organization and equipment now contemplated and provided for, the grading operations will have to stop some time in September and practically tie up for the rest of the year.

In the bidding of the job, in its planning and in equipping it, efficient and expeditious handling, plant and organization were contemplated, we wanted to get in, go after the job and turn it over complete and ready for operation at the earliest possible date. We hoped to be able to complete the conduit before 1936 high water so that after high water the entire site for embankments would be available for efficient organization of the grading work.

Concrete plant is here on the ground, and of generous capacity, sand and gravel has been arranged for and the gravel plant has been moved out to the pits and at the present writing we do not know when a single item of the Government material will be furnished nor have we received a single detailed plan for the structure work. It will not be long before we will be very close to the high-water period and once into it we cannot possibly see work enough in sight to maintain any structural organization.

The day following the writing of this letter, plaintiff's representative had a conference with Mr. Comstock, de-

fendant's superintendent, and determined to go to defendant's office at Denver, which he did the same date, April 7, 1936, spending three days there in the endeavor to obtain necessary drawings and working plans and materials in order to carry on the work. Upon his return he wrote on April 14, 1936, to defendant's representatives, Mr. Comstock and Mr. Smyth a letter advising, in part, as follows:

For the conduit outlet works it is understood that the reinforcing steel is now ordered to arrive before May first. I believe that this is for just an upstream portion. I do not know how much of the structure is included, that is, in the first reinforcing order. We should have everything in the way of reinforcing steel, joint felt and all other materials including trashrack, upstream headwalls and conduit barrel downstream as far as Sta. 5+24.00, which is the location of the construction joint, and where the transition in the flare to the gate chamber starts. Any acceleration that can be secured in the routine of securing and delivering this reinforcing steel will be much appreciated. We have to haul this steel out forty miles, bend and place it before it can be used and time is a very important consideration at present.

Steel sheet piling, it is understood, is to be bid on April 21st and that invitation for bids calls for five-day delivery at Riverton, and that it can be expected at Riverton on or before May 5th. *If the date for delivery can be set ahead on this steel sheet piling it will be very much appreciated.* It is understood that steel sheet piling has been substituted for the walzo-field wood sheet piling called for in the preliminary plans, and that the section to be used is 16″ arch web ⅜″, 50.7 per ft. of pile, section modulus 3.23″ and that the order calls for 290 pieces to be shipped at one time, or rather all at the same time.

It was understood that the tile pipe for the T-drains was to be shipped before now from a Denver supplier so that it could be expected to arrive in Riverton early this present week.

Among the plans received at this office on Monday there were none showing details of the reinforcing in the trashrack for the upper end of the conduit. Those we would like to request at as early a date as possible as the trashrack will be the very first thing poured if we can get the plans and materials involved. And if

we can get the *bar cutting and bending schedules and details for the steel ordered just as soon as possible and the same information for the rest of the steel as far in advance as possible* we will be greatly aided.

Arrangements have to be made for either commercial bending of the bars or else we have to secure a suitable power machine to do this on the job, it is out of the question to attempt or even start on nearly two million pounds of steel by hand methods and either method of procedure will consume some time in preparation on our part after the receipt of the steel schedules.

The foregoing is our understanding of the shipping program that may be expected and in the absence of official information we have to proceed on assumptions and the best information available. We are proceeding with our preparations, organization and the heavy expenditures incident thereto with expectations as herein outlined. If our understanding is wrong in any respect, if changes have been made or are made in time or quantity of shipments, or changes in plans or materials please advise us as soon as possible. The program we are endeavoring to carry out involves a heavy expense on which the management is insisting we realize without delay. May we not be kept fully and promptly advised as to the ordering, shipment, routing and movement of all materials, the availability of plans needed, and any and all changes and delays that may be encountered in some, so that we may be as well prepared to adjust our operations accordingly with a minimum of expense and lost motion in our organization and operations.

P. S. Since the above was written, information has been secured that there has been a delay in the tile pipe for T-drains and that this item instead of being en route from Denver may possibly be ordered from Des Moines, Ia. We need this very badly, T-trenches are now excavated on the job and ready for drain pipe and we can do nothing in the way of stripping rock and placing same in the embankments, nor can we do any embankment building until these T-drains are backfilled. Delay in the pipe will seriously delay our work and cost us heavily at this time. *Please do everything you can to expedite this pipe shipment.*

We have made a cash outlay on this job of over $32,000.00 and M. S. Ross has spent $25,000.00 and now seven weeks after notice to proceed we do not know when our first item of material will arrive.

Furthermore we do not know where it is to come from, so that we are entirely in the dark whether it is a matter of a couple of days or a couple of weeks.

Please impress on the organization and departments handling these matters that we are forty miles from a small town in a sparsely settled community where transportation facilities are meager and we cannot increase and decrease our organization accordion fashion. We do need to see our program a little ways ahead at least and we most urgently bespeak the cooperation of all involved and assure you that it will be most sincerely appreciated.

We do not want to overstate or to exaggerate our problems, and we do not want to be pestiferous nuisances but we have got to, *just got to*, get ready to commence to start to go pretty quick and sure will be thankful if we can be assisted along the lines as herein discussed.

12. April 13, 1936, plaintiff received from defendant the first detailed plans, made in pencil tracing dated April 8, 1936, and at once commenced to build form work for the conduit, and to perform such restricted operations as could be carried on.

A few days subsequent to April 13, 1936, defendant directed plaintiff to excavate three test pits at Stations 2, 4, and 6 on the center line of the conduit, in order to investigate further the foundation under the conduit, this being an order for extra work. The tests indicated a satisfactory condition, and stripping of the conduit area was commenced April 22, 1936; excavation for the conduit was begun about May 21, 1936.

May 22, 1936, while plaintiff was engaged in excavation for the conduit, and while Mr. F. F. Smith, defendant's Superintendent of Construction from the Reclamation Office at Denver, and Mr. Smyth, resident engineer, were on the site, a condition similar to quicksand was uncovered. This condition was unknown to either plaintiff or defendant prior to this date. The defendant held up further excavation pending determination by its engineers of procedure to overcome the difficulty encountered. May 29, 1936, the defendant's Denver office determined upon corrective treatment and wrote its local engineer explaining the plan, which provided for extension of sheet-steel piling upstream to enclose the entire

upstream end of the conduit and the trashrack structure, excavation of faulty material between rows of piling, and backfilling with especially selected material rolled and compacted, certain cross rows of piling drawn at twenty-foot centers, making a cellular substructure, together with other necessary changes in design and plan. Plaintiff was furnished a copy of the said letter of May 29, 1936. These changes required revised plans to be made and purchase and delivery of sheet-steel piling by the defendant.

13. The defendant issued its change order No. 1 covering the work necessitated by the change, and provided for additional compensation, and extended the contract time 120 days. This change order was issued September 23, 1936, after all of the work provided for in the change order had been performed. Plaintiff signed the change order December 1, 1936, stating: "Adjustment of the amount of compensation due under the contract and/or in the time required for its performance by reason of the changes above ordered is satisfactory and is hereby accepted."

The plaintiff did not require 120 days for performance of the work under the change order, but was granted it because defendant's representatives realized that plaintiff was behind its construction schedule. This change order amounted to a material change.

14. Upon determining the changes to be made the Government advertised for bids for the steel required and obtained the same and had it delivered to the project for plaintiff's use. Approximately 30 days were required for this to be accomplished. After the plans were furnished they had to be revised, so that final plans for proceeding with the work were not delivered to plaintiff until June 24, 1936.

Plaintiff, on receipt of the letter of May 29, 1936, giving the outline of corrective changes to be made, cleared an area, used some sheet steel-piling on hand and performed such other work on the project as was practicable at that time, pending arrival of plans and material to be furnished by the defendant.

15. Due to delays incident to discovery of the insufficient foundation, plaintiff was unable to pour concrete in the conduit until July 25, 1936.

The concrete work on this conduit was completed December 19, 1936.

16. There were employed approximately 50 men in April 1936 to approximately 90 men in July 1936, so that plaintiff's supervisory force was occupied to a considerable extent during the period April through July 1936.

Plaintiff suffered delays during this period not attributable to defendant due to various causes. For example, a three-yard Northwest Dragline became embedded in the creek requiring several days for its removal; delay early in May in removal of oversized rock for fill; delay of about three days the latter part of May while engaged in stripping for excavation of spillway; suspension of operations due to heavy rains in June and July. These delays consumed approximately 15 days during this period to the end of July 1936.

17. Under the specifications plaintiff was required to mix concrete with ingredients and in proportions as designated and directed by defendant's engineer supervising the operation. During the fall of 1936 the concrete mix for the work on the conduit proved to be unsatisfactory and resulted in considerable honeycombing, necessitating replacement. Plaintiff was using one vibrator. This situation continued until about September 29, 1936, when defendant replaced its engineer with another engineer who redesigned the concrete mix and also supplied another ingredient, an admixture, which made the mix more workable. Plaintiff added two more vibrators. A more satisfactory mix was produced and accepted.

The cause of the unsatisfactory concrete was in the main the failure of defendant to prescribe proper ingredients in correct proportions for making satisfactory concrete. This period of slowing down delayed the concrete work.

18. Plaintiff was required to heat concrete from November 2, 1936, until December 19, 1936, when the work was closed down for the year. Weather conditions and operational delays not attributable to the defendant were responsible for a considerable portion of plaintiff's delay on this operation.

19. Plaintiff had advised defendant, pursuant to its inquiry of August 26, 1936, that it intended to pour concrete in the outlet works stilling basin about October 1, 1936. De-

fendant prepared to furnish materials and cutting lists in accordance with that plan. On or about September 10, 1936, plaintiff advised defendant that its plans had changed and that it intended to pour concrete at an earlier date, or about September 12, 1936. The cutting lists for steel, which defendant was under obligation to furnish, were expedited and sent to plaintiff within a reasonable time. There was no delay chargeable to defendant.

20. In constructing the conduit plaintiff used two sets of forms in pouring concrete. The forms were required to be left in place for approximately seven days. Defendant alleges had plaintiff used more than two sets of forms it would have completed the conduit before cold weather.

The proof does not show that plaintiff acted unreasonably in not using more than two forms on the conduit.

21. The contract did not provide for closing down of operations during the winter of 1936–37, but subsequent to December 19, 1936, plaintiff closed down its operations and practically all of plaintiff's personnel left the work except two or three men to protect the concrete from freezing until the approval of the contracting officer as to the concrete was received about January 1, 1937.

Approximately January 13, 1937, two or three of the men returned to the project and began checking quantities, bringing records up to date, surveyed what had been accomplished, prepared plans for prosecution of the work during 1937, and overhauled equipment. This continued until late in February 1937. Severe winter weather during this period prevented substantial progress on the project.

22. Under date of February 12, 1937, plaintiff furnished defendant with its proposed construction schedule for 1937, which contemplated completion of the entire project in September 1937. Plaintiff's letter transmitting the progress schedule is as follows:

> Enclosing herewith four prints of our construction program dated February tenth. It is believed that the print is entirely self-explanatory—attention is invited to typed notes on the margin.
>
> We would like to request that plans and material be provided to carry out the program as thereon outlined without delay to our operations as was the case during

1936. It is especially desired that we be provided with plans for the spillway stilling basin at the earliest date possible. This portion of the structure we want to build just as early as we can. If the excavated material is suitable, it is to our advantage to get it into the dam embankment with a minimum of uphill haul.

Furthermore, if we get the excavation out and then have to wait for either plans or material, we will no doubt have banks, causing heavy unwatering expense with all the attendant difficulties and extra cost in each case. If we are delayed at all on the spillway stilling basin, it is very apt to throw us into the high water period, and the difficulties outlined above will be thereby complicated and increased by greater seepage of water into the excavation and our expense increased in even greater proportion.

We also have received no complete plan for the gatehouse shaft and would like to have them supplied at as early a date as possible so that forms, reinforcing steel, and so forth, may be prepared in advance to facilitate and expedite our work.

May we please be advised at your early convenience, on what dates we may expect the plans for the spillway stilling basin and the gatehouse shaft? Our delays in the past have been excessively costly to us, and it is hoped that continuance or repetition of past delays be avoided.

Should there be anything on the construction program that does not meet with your approval, looks inconsistent, or that cannot be accomplished becaused of inavailability of plans or material, or for any other reason, departmental, engineering, or otherwise, please so advise immediately, and we will fully cooperate to correct, adjust, or alter our plans and program where necessary.

The defendant replied under date of February 26, 1937, as follows:

Reference is made to your latest Construction Program dated February 10, 1937.

This program has been forwarded to our Denver office and under date of February 19, the Acting Chief Engineer comments as follows:

"It is intended to issue advertisement for reinforcement steel in about a month, but it can be issued sooner if you wish.

"Provided the necessary information as to foundation materials encountered is furnished promptly, there will be no undue delay in delivery of plans."

Drawings of Spillway stilling basin were furnished you August 10, 1936. It is, of course, possible that these plans may have to be modified on account of the quicksand disclosed by the test pit. The foundation for this basin should be in blue clay or other material equally suitable. Plans furnished you contemplate such a foundation. The Denver office does not feel justified in revising them to provide for quicksand over any appreciable part of the foundation and is at a loss to know what parts of the foundation, if any, may require modification.

In view of your desire as expressed in paragraph 2 of your letter of February 12, it would seem desirable to begin the excavation of the spillway stilling basin as soon as weather conditions permit. You will note that on your program it is proposed to start this excavation from one month to 15 days later than other grading items.

As you are doubtless aware the stakes for excavation of Spillway stilling basin have been set since last September.

23. During 1936, while excavating for the conduit, quicksand conditions were discovered in the foundation area, which indicated that a seam of this inferior material would probably extend to the area of the left wing wall spillway basin. This was confirmed by a test pit ordered excavated by the defendant.

February 26, 1937, upon receipt of plaintiff's construction program for 1937, defendant wrote plaintiff the foregoing letter which stated that it was realized that plans furnished plaintiff in August 1936 might have to be revised but desired further information as to the entire foundation area before revising the plans.

May 14, 1937, while excavation was in progress within the area of the spillway stilling basin, left wing wall, quicksand conditions were encountered which did necessitate revisions of the plans for this operation. These plans were received May 24, 1937, and further revised plans for the left wing wall structure itself were received June 16, 1937. Plaintiff during the delay periods placed its labor on other portions of the project. The foundation was corrected in similar manner to the foundation on the conduit structure by placing of steel sheet-piling and excavation of objection-

able material and placing compacted material in its place. This was a minor operation compared to that of the conduit. The conduit provided for 12 or 14 cells while the instant plan provided for two cells. August 2, 1937, defendant issued Change Order No. 4, providing for changes and compensation for the additional work and no additional time allowance. This change order was duly agreed to and accepted by plaintiff.

When the revised plans were received plaintiff began driving steel sheet-piling to form cells. Within five or six days the supply of piling became exhausted and there was further delay pending arrival of an additional supply, which came about June 25, 1937, and plaintiff completed the pile driving for the cells about June 26, 1937. Plaintiff again shifted its labor to other work on the project.

Plaintiff's next operation was to excavate the inferior materials from the interior of the cells and replace the same with approved material. During the latter stage of the excavation of the cells pressure from outside the cells caused a cave-in, which threw the piling out of alignment. Plaintiff claims that during the extended periods while waiting for steel sheet-piling, rains caused the ground to become saturated, thus causing the cave-in. Defendant claims that during the process of excavation plaintiff should have applied bracing within the excavated area to prevent caving; also that when the cave-in occurred plaintiff discontinued excavation and commenced to refill with compacted material, thus saving further excavation and expediting the work.

It is not shown that the entire contract work was substantially delayed as a result of the delays on this operation.

24. Down the length of the spillway were four or five cutoff walls. Plaintiff excavated trenches for all of these before proceeding with pouring concrete. This covered a period of approximately a week. It was found that there was a shortage of reinforcing steel, and plaintiff was compelled to wait for some time for this material. Pending the arrival of the steel, rains caused the excavation, about 140 feet in length, to cave in, requiring reexcavation and some added expense. Plaintiff's workmen had been placed on other work on the

project. Plaintiff experienced some delay in this particular operation, but it is not shown to what extent.

25. Plaintiff complains that the Government made errors in cutting and bending steel and increased its cost. The proof shows that the defendant did at times make errors in this respect and that the extra cost to plaintiff was made up by addition to the appropriate monthly estimates, and plaintiff was so advised. Plaintiff did not suffer materially increased costs because of these errors.

26. In connection with placing reinforcing steel, it was defendant's duty to furnish plaintiff with cutting lists so that the steel might be cut in proper lengths. Plaintiff claims that defendant caused it delays at various times during the contract period in failing to furnish cutting lists promptly as needed. The defendant claims that plaintiff immediately upon receipt of a cutting list proceeded to cut the entire stock of steel and as a result had no reserve supply on hand for use in operational exigencies and that it should have cut a supply for two weeks only.

27. Plaintiff reached the point for installing radial gates the middle of September 1937, and the defendant specified the use of a certain aligning device for checking the accurate alignment of the gate hinges or pivot points but there was a delay of approximately two weeks in furnishing this device for plaintiff's use. On its arrival it was found to be oversized, necessitating correction, which caused delay. Three efforts were made before the aligning device was made to work accurately. Then there was delay in furnishing shim and babbitt metal used in making accurate alignment. This material was finally received when plaintiff's superintendent went to Denver, expedited its preparation, and brought it back in his automobile. The entire operation was finally completed the latter part of October 1937. The operation should have been completed in approximately two weeks, and plaintiff thereby experienced delay. The proof shows that this delay had an effect on the ultimate date of completion of the contract work, but fails to show a definite amount of delay.

The delay incident to the radial gates caused a short delay in construction of the highway bridge, the gates being directly underneath the bridge, making it advisable to have the gates

adjusted before proceeding with the bridge. This delay increased plaintiff's costs. The proof is inadequate to establish a definite period of delay or the additional costs caused to plaintiff. Plaintiff shifted its labor force to other operations during these periods of delay.

28. The parapet wall was to be erected on the upstream side of the crest of the dam, the "handrail" alongside the highway. There was to be a curb on the opposite or north side of the highway. Under date of January 1937, the defendant's Reclamation Office directed plaintiff not to make preparations for construction of the parapet wall until settlement had been determined; that this work might have to be delayed for a year. Under date of July 17, 1937, defendant advised plaintiff in writing that it might now proceed with construction of parapet and curb wall.

Plaintiff did not have on hand required reinforcing steel for this construction work and so advised defendant. The reinforcing steel was ordered and arrived at the site of the project September 17, 1937. When the reinforcing steel arrived on September 17, 1937, plaintiff proceeded with the work and completed about 320 feet, or approximately 11% of the work, but the cold weather and frost condition rendered continuation of the work impracticable and unwise so that the remainder of the work was discontinued until resumption of work in the spring of 1938 when the entire operation was completed.

There is no satisfactory showing that the defendant prevented completion of this work before the inception of cold weather.

29. There was a short indefinite period of delay in receiving special tile pipe to provide drainage for the spillway necessitating suspension of that work. During this period workmen were placed on other operations.

In November 1937 there was a short indefinite period of delay in connection with installation of piping for hydraulic operation of the high pressure gates inside the conduit. Piping was on hand but an error was discovered in the details of the piping to the control valves. Defendant's office at Denver was advised of the situation and an engi-

neer was sent from Denver who directed such changes as were desirable to remedy the situation.

30. During the fall of 1937, plaintiff's superintendent advised defendant's Superintendent of Construction that it was doubtful whether it could complete the contract work by May 28, 1938, which was the completion date of the contract, due to winter weather conditions. As a result of the conference between the two parties the defendant issued a stop order dated January 3, 1938, which remained in effect until April 15, 1938, being a period of 101 days, when plaintiff resumed work.

31. Plaintiff claims certain expenditures for labor compensation insurance and equipment rental due to the caving in of earth in connection with the cut-off wall of the spilling basin. The proof is not satisfactory as to what actual expense, if any, plaintiff experienced on this operation, nor are any expenses as such verified by plaintiff's books and records.

32. Plaintiff is also seeking to recover damages which it claims its excavating subcontractor, Matt S. Ross, suffered due to some of the aforesaid claimed delays. The claims on account of the excavating subcontractor are, first, expense of supervisory personnel, and second, idle equipment.

Mr. Ross, as his first operation, excavated a diversion channel along the north side of the river in order to drop the elevation of the lake so that excavation for the conduit might proceed as soon as weather conditions would permit. Then he contemplated continuing excavation for the conduit and expected to begin the embankment work the end of September 1936, or upon plaintiff's completing the conduit, and work also to a certain extent on the north side placing the embankment fill there, completing about 10′ or 15′ of fill in 1936. He expected to use three shifts during the 24 hours and to complete the greater portion of his work during midsummer of 1937. He actually practically completed his work at the end of 1937, returning in 1938 to perform some small items. Mr. Ross had an adequate amount of equipment on the project for commencement of the work in 1936 according to his plan of operations.

Mr. Ross experienced considerable delay by reason of the insufficient foundations, the subject of findings hereinbefore.

He also experienced additional delays due to adverse weather conditions both in 1936 and 1937. He found it necessary to bring to the project considerable additional equipment during 1936 and also in 1937, as his work progressed. In order to have worked three shifts Mr. Ross would have had to spend from $4,000 to $6,000 for lighting the project at night. The progress of his work in the main river channel depended largely upon the progress plaintiff made on the conduit and outlet work, and it was necessary to divert the river through the conduit before he could put in the fill on the north side, which was the main portion of his work. Water was diverted through the conduit in the spring of 1937. From May to November 1936 he excavated 333,366 cubic yards; from May to November 1937 he excavated 516,748 cubic yards.

At all times during the progress of the subcontractor's work he had one shift busy, and occasionally added another shift. Substantial additions to his equipment enabled him to obtain greater results in 1937 than in 1936. There is no proof that he actually prepared to light the project at any time or that he did use, or would have used, more than two shifts in 1937.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant December 31, 1935, whereby it was to construct the Bull Lake Dam, Riverton Project, State of Wyoming, under the supervision of the Bureau of Reclamation.

It was an undertaking involving $653,397.50. The dam was earth-filled with appurtenant concrete structures. The earth embankment was raised by the plaintiff's subcontractor, Matt S. Ross, while plaintiff with its own forces did the concrete work. Materials such as sheet steel-piling, cement, steel, reinforcing steel, were furnished by the United States. The plaintiff's claim is wholly one for damages due to alleged unreasonable delay both to itself and its subcontractor Ross, chargeable to the defendant.

The contract contained the usual provision that work was to start within a certain period after receipt of notice to pro-

ceed. The maximum time for completion was 700 days. The notice to proceed was received February 24, 1936, in the midst of winter, thus establishing January 24, 1938, as the date for completion, also in the midst of winter.

The plaintiff anticipated the initial contract date by moving into the work about the first of January, 1936, establishing a camp, doing preliminary work.

In the climate afforded in winter by the region where the dam was to be located, construction work could not start before spring.

The plaintiff transmitted its progress schedule to the defendant March 14, 1936. Prior thereto the defendant February 14, 1936, had changed the method of constructing the gate chamber of the outlet conduit from two-stage to one-stage construction.

The outlet conduit was located beneath the embankment. At the conduit's upstream intake end there was a trash rack and at its lower end a stilling basin. Flow of water through the conduit was controlled by gates, and the chamber housing them was that referred to in the change order of February 14, 1936. The conduit was of concrete construction. Some 200 feet from the outlet conduit was located, across the dam and near its center a concrete spillway and stilling basin. The spillway was provided with taintor gates and was spanned by a bridge in the dam.

The plaintiff scheduled commencement of work on this outlet conduit April 1, 1936, concrete to be poured beginning April 15, 1936. The construction program was a matter of cooperation between the plaintiff and defendant's resident engineer.

Upon receipt of the plaintiff's schedule of proposed progress in the middle of March, 1936, defendant's officers made necessary changes in drawings and prepared detailed plans of the conduit, to suit them to plaintiff's schedule.

The conduit plans were necessary to enable the plaintiff to proceed, and they were not delivered to the plaintiff until April 13, 1936. The plaintiff had planned to proceed on that part of the project the first of April, and this meant a two-weeks' delay.

The question is presented whether the defendant took an unreasonable length of time to perfect the plan of the conduit, after receipt in the middle of March of plaintiff's schedule of progress, and present that plan to the plaintiff. The time so spent was one month. We cannot say, or infer, from the circumstances recited in the Court's findings, that the defendant was guilty of an unreasonable delay. If we understand plaintiff's brief correctly, the plaintiff concedes the well-established rule that in cases of this sort the defendant is entitled to a reasonable time to perfect plans for changes without responding in damages.

Upon receipt of the revised plans April 13, 1936, the plaintiff proceeded with its form work for the conduit.

But the excavation for the conduit awaited the result of test pit data, which the defendant required of the plaintiff under an order for extra work. The tests indicated a satisfactory condition, no delay in making the tests was involved, stripping the area commenced April 22, 1936, and excavation for the conduit was begun May 21, 1936.

There then developed a condition upon the site itself that delayed the work. On May 22, 1936, one day after starting to excavate for the conduit, quicksand or something equivalent to quicksand was uncovered. This of course was unsatisfactory material upon which to lay the conduit. Defendant at once put a stop to the excavation to determine upon means to correct the situation. In a week's time, May 29, 1936, the defendant determined upon the corrective treatment and gave notice thereof to the plaintiff. The affected area was surrounded by piling, the faulty material removed and in its place selected material was deposited and compacted, using a cellular substructure for that purpose. This corrective treatment was covered by revised plans and the defendant had to furnish the extra sheet steel-piling. The work was done in something less than 120 days, but after it was done the change order was issued, September 23, 1936, ordering the change, extending the contract time for performance by 120 days, adjusting the contract price on account of the change, and the change order was accepted and signed by the plaintiff December 1, 1936.

The notice of May 29, 1936, however, was not a notice to proceed, for resumption of work could not take place before the corrective plans were drafted. The plans so drafted had to be revised, and the revised plans for proceeding with the work were not in the plaintiff's hands until June 24, 1936. But that was not all that was required of the defendant, for the defendant, when the changes had been decided upon, had to advertise for bids for, purchase, and deliver to the plaintiff the necessary extra steel. Acquirement of the steel took approximately 30 days and plaintiff was unable to pour concrete for the conduit until July 25, 1936. It had planned to begin pouring April 15, 1936.

Here again we can find no lack of diligence upon the defendant's part.

The price of a change order, like the price of the original contract, presumptively embraces cost, inclusive of overhead, is not without prospective profit, and the change order, like the original contract, gives a time certain for performance. The change we have here, attributable to unforeseeable conditions, is authorized by the contract to be made, and it is too well-settled to deserve citations, that damages are not recoverable for delays occasioned solely by authorized changes. Dilatory action in considering a change is no proper part of the procedure authorized by the contract in making a change, but here we can find no neglect by the defendant properly to expedite matters.

There are damages claimed by the plaintiff for other delays. The plaintiff began its operations on the conduit July 25, 1936. Honeycombing developed in the concrete as mixed under the defendant's formula. The defendant revised the formula and the mix was then satisfactory. The fact that in the first instance the plaintiff used one vibrator and in the second, two, had a minor influence, if any, in the result. The main trouble, under the circumstances, was the formula. There was no occasion for changing the formula if no fault lay therein. By reason of all this the concrete work was delayed, but the effect on ultimate completion of the job the parties to the cause do not undertake to demonstrate.

The plaintiff claims damages by reason of expense incurred in heating concrete during freezing weather, the work having

been thrown into winter months due to the delay arising through the instability of foundations for the conduit. As heretofore explained, this was not defendant's fault, and the item is not recoverable.

The plaintiff had advised the defendant that it intended to pour concrete in the outlet works stilling basin about October 1, 1936. The plaintiff changed this program and on or about September 10, 1936, advised the defendant that it expected to pour about September 12, 1936. This was short notice, but the defendant expedited its cutting lists for the reinforcing steel and furnished them to the plaintiff promptly. There was some delay, if September 12, 1936, was to be the date to start pouring, but this delay was not defendant's fault.

There is some contention that plaintiff could have expedited the work by using more than two sets of forms in pouring concrete for the conduit. A matter of that sort is one of sound judgment, taking into consideration economy, expedition, organization. There is found no proof that the plaintiff acted unreasonably in restricting the set of forms to two in number.

Finding No. 22 gives details concerning the work during the winter of 1936–1937. Plaintiff closed down its operations, using a small detail of men to guard the premises, check things over, overhaul equipment, plan for the coming of milder weather. Under the circumstances this is apparently all that plaintiff could do, and neither party is to be charged with any fault over the immediate cause of the delay. The project was located in country where low temperature is experienced in winter.

Before the parties were freed from winter restrictions the plaintiff furnished the defendant with its plans for 1937, indicating completion of the entire project in September of that year.

The 1937 program included construction of the spillway. Here were encountered quicksand conditions, as in the case of the outlet conduit, but not to such an extent. The cellular method of stabilizing the foundation was adopted. The investigation which resulted in laying bare quicksand conditions in the outlet conduit area, indicated that such conditions might extend to the spillway.

Final revised plans for the affected area of the spillway were received June 16, 1937. The plaintiff began driving steel sheet-piling for the cells (there were only two of them, as compared with 12 or 14 for the conduit) but within five or six days ran out of piling. The requisite additional supply arrived June 25, 1937, and the pile driving was completed about June 26, 1937.

After the piles were driven the next step was to excavate from within their boundary. Some of the piling caved in due to external pressure. Plaintiff attributes this to a softened ground condition due to rains while plaintiff was wating for additional piling. If the ground was soft when excavation was going on, plaintiff knew it, and it was bound to take proper precautions.

However, the plaintiff did run out of piling, which it was the duty of the defendant to furnish, but, as in other instances, the plaintiff diverted its labor to other parts of the work until the piling arrived, and no substantial delay in final completion of the contract is proved.

But rains did interfere with plaintiff's excavation for cut-off walls down the length of the spillway. Reinforcing steel, which defendant was to furnish, was not at hand, and rain washed down, caving in the excavations, while the plaintiff was waiting for the steel. The concrete could not be poured without the reinforcing steel. Delay was experienced, but the extent thereof is not shown.

Errors were made by the Government in the matter of cutting and bending steel, but no material increase in cost to the plaintiff, not reimbursed the plaintiff, presents itself.

Finding No. 26 relates to plaintiff's wholesale method of cutting steel, which defendant says allowed it no reserve for exigencies. The method used by plaintiff was imprudent.

Proof as to delay in installation of radial gates is not complete. The Government failed to furnish a specified aligning device in proper condition and time, and this failure delayed completion of the contract, but just to what extent is not shown. The incidence of this delay fell upon construction of the highway bridge. The gates had to be adjusted before proceeding with the bridge, but here the proof also is defec-

tive, and we do not know whether it affected completion of the contract, or what plaintiff's extra costs were, if any.

The project included a parapet wall on the upstream side of the crest of the dam, with a handrail alongside the highway. There was to be a curb on the opposite or north side of the highway. Here again there was delay in furnishing the reinforcing steel for the concrete work, but the effect in time on ultimate completion of the contract is not disclosed. Cold weather intervened and the work was resumed and finished in the spring of 1938.

There were short, indefinite periods of delay in connection both with furnishing and with installation of piping. Whether plaintiff was delayed in the ultimate completion of its contract thereby is not disclosed. It appears to be merely a matter that had little or no effect on the work, because of plaintiff's practice of shifting its force to places where work could be done, a practice which must be considered a matter of course. With a given force of workers this might well result in no appreciable delay.

Winter again interrupted operations. This was anticipated by the parties in a conference in the fall of 1937, as a result of which the defendant issued a stop order dated January 3, 1938, effective until April 15, 1938. Being the result of a conference, it was not a forced order, and the seasonal stoppage of work may not be charged to either party.

The remainder of plaintiff's claim is in behalf of its subcontractor, Matt S. Ross, who did the earthwork, that is, excavating and filling, including the embankment of the dam, which was earth-filled. But this subcontractor's delay, somewhat less than that of the plaintiff, was due to two things, adverse weather, and quicksand conditions in the foundations. Neither of these conditions was the fault of the Government, and as we have seen, there is no proven lack of diligence upon the part of the Government in meeting those conditions. The quicksand conditions required a change in the work. Appropriate change orders were issued correcting foundation conditions both under the conduit and under the spillway, naming the price, and these orders were accepted by the plaintiff. There was no breach by the defendant in connection with foundation conditions.

Syllabus

On the whole case there is established either no breach of the contract, or where breach might be inferred, no sufficient proof of the extent of any resulting delay or the amount of any additional expense.

Plaintiff is not entitled to recover and its petition is therefore dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge*, took no part in the decision of this case.

TRUST COMPANY OF GEORGIA AND JAMES E. DICKEY, TRUSTEES FOR CHARLOTTE LOUISE WOOLFORD v. THE UNITED STATES

[No. 45667. Decided May 7, 1945]

On the Proofs

Income tax; taxation of income derived from distributions by corporation as capital gains or as a partial liquidation.—Where a corporation proposed to rearrange its capital structure so as to permit those who were in active management of its business to retain control of the company through stock ownership; and where the corporation bought its own stock from random stockholders, some of whom sold varying parts of the stock at various prices and some of whom sold none; it is *held* that plaintiff's gain on sale of stock to the issuing corporation in 1937 was taxable only to the extent of the 30% limitation provided in Section 115 (c) of the Revenue Act of 1936, and not taxable to the extent of 100% as provided in Section 115 (c), Act of 1936, as an amount "distributed in partial liquidation," as that term is defined in Section 115 (i).

Same; purpose to prevent avoidance of taxation on a distribution which was equivalent to a dividend.—The spirit of the pertinent provision, Section 115 (i), was to prevent avoidance of taxation on a distribution; the gain derived from the sale to the corporation of its stock by one stockholder, without more, has none of the elements of a dividend.

Same; not a transaction in partial liquidation.—Where under the charter of the corporation, as amended, the directors had the power to resell at any time, at any price, without limitation, the stock redeemed, purchased or otherwise acquired from its stockholders; it is *held* that the transaction in which the plaintiff sold the stock to the corporation does not come within the

letter of Section 115 (i), which defines a partial liquidation as a transaction which results in "complete cancellation or redemption of a part" of the corporation's stock, since it was, in the instant case, the certificates of stock, not the stock, that were cancelled.

The Reporter's statement of the case:

Mr. W. A. Sutherland for the plaintiffs. *Mr. Charles L. B. Lowndes* and *Messrs. Sutherland, Tuttle & Brennan* were on the brief.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiffs are the trustees for Charlotte Louise Woolford under a trust created by Cator Woolford dated August 20, 1935.

2. In the manner hereinafter set forth, plaintiffs, on January 14, 1937, disposed of 545 shares of Class A preferred stock of the Retail Credit Company to that company, which stock plaintiffs and their predecessor donor-grantor had held for more than ten years. The stock had a cost basis for tax purposes of $7,771.70 and the amount received for it was $57,225. The Commissioner of Internal Revenue in determining the plaintiffs' income tax for the year 1937 treated the transaction as a partial liquidation and therefore not subject to the 30 percent limitation provided in section 117 (a) of the Revenue Act of 1936. The parties have stipulated that if the Commissioner was correct in his holding, plaintiffs are not entitled to recover any portion of the taxes paid, but that if plaintiffs are correct in their contention, their taxes were overpaid in the sum of $10,704.67, and that interest was paid by plaintiffs on that overpayment in the sum of $1,025.74.

3. The sums alleged to have been overpaid were paid to the Collector of Internal Revenue at Atlanta, Georgia, on October 19, 1939. A claim for refund based upon the grounds stated in this suit was filed by plaintiffs on June 30, 1941, and that claim was rejected by the Commissioner on August 5, 1942.

4. The Retail Credit Company is a Georgia corporation with its principal place of business at Atlanta, Georgia. The company was founded in March 1899 and incorporated in 1913. The business of the company is that of making reports to insurance companies concerning the advisability of accepting applications for insurance, the making of financial and personal reports on matters of concern to its patrons, such as credit reports, and the carrying on of a general reporting business.

5. The founders of the Retail Credit Company were anxious to keep the control of the company in the hands of those actively engaged in its management after the death or retirement of the founding group. In order to do this a plan was adopted in 1925 under which much of the common stock of the company was to be exchanged for a new type of stock known as "participating preferred." The new stock was identical with the common stock as far as sharing in the control and earnings of the company was concerned. However, it was callable at a price determined by a formula based upon book value and earnings over a period of years. The reason for issuing the new stock was to have stock which could be called upon the death of one of the founding group and resold to key employees of the company in order to keep control of the company in their hands. To help finance these anticipated purchases life insurance was taken out upon the lives of the principal stockholders. By December 31, 1930, this plan had progressed to a point where, of the 104,908 shares of stock outstanding upon that date, 89,738 were participating preferred and 15,170 were common. About that time it was discovered that the formula basis for calling the participating preferred stock had some serious defects. For example, if one of the principal stockholders died, his stock would be purchased at a certain price per share. If, however, his death was followed by that of another stockholder, the stock belonging to the latter would be purchased at a lower figure due to the depletion of the company's assets by the purchase of the stock of the first stockholder. In addition to this, it was felt that it was undesirable for the estates of the principal stockholders to have so much cash coming in

at one time which would have to be reinvested. Accordingly, a better plan was sought to keep the control of the company within the active management group. The principal feature of the plan adopted was a recapitalization which provided for the issuance of a new Class A preferred stock to holders of common or participating preferred stock on the basis of one share of Class A preferred for each five shares of participating preferred, and the exchange of participating preferred stock for common stock. The outstanding participating preferred stock was 7 and 8 percent stock, whereas the new Class A preferred stock was 6 percent stock. Under the new arrangement it was planned that the Class A preferred stock would assure the founding group and their families, so long as they or their families retained their interest in the business, a stable income after their retirement from active management or their deaths, and would at the same time permit their common stock to be sold to the younger men in the company so as to keep control of the company in the hands of the active management. No tax motive was involved in providing for the foregoing recapitalization.

6. In order to carry out the plan referred to in the preceding finding a resolution was adopted at a meeting of the stockholders of the Retail Credit Company on April 27, 1931, authorizing an amendment of the charter of the company, and on May 25, 1931, the Superior Court of Fulton County, Georgia, approved the amended charter. The charter, as amended, authorized the issuance of 150,000 shares of no par value common stock and 50,000 shares of no par value Class A preferred, with a proviso that the total outstanding capital stock should at no time be less than 50,000 shares of no par value common stock. The Company was empowered to redeem and retire all capital stock in excess of that minimum. The board of directors was authorized to select for redemption and retirement any particular share or shares of the Class A preferred without any pro rata restrictions. Only the common stock had voting privileges.

7. On May 28, 1931, the board of directors of the Retail Credit Company adopted resolutions to make effective the amended charter and called for redemption as of July 1, 1931,

all outstanding preferred stock which had been issued prior to the recapitalization. The board also ordered the issuance of a stock dividend of new Class A preferred stock to holders of record of common stock on July 1, 1931, at the ratio of one share of Class A preferred for each five shares of common stock. The Class A preferred stock was ascribed a value of $100 per share for purposes of the sale by or purchase by the company of fractions of shares. Pursuant to the foregoing action of the board of directors, 22,296 shares of Class A preferred stock were issued to 364 stockholders on July 1, 1931, as follows:

	Shares
Issued to holders of participating preferred stock and as a stock dividend on the common stock	20, 940 3/5
Less: 101 fifths purchased by company at $100 per full share	20 1/5
	20, 920 2/5
Plus 68 fifths sold at $100 per full share	13 3/5
	20, 934
Shares sold at $100 per share	1, 362
Total Class A preferred stock issued to 364 stockholders	22, 296

On July 13, 1931, all of the common stockholders of the Retail Credit Company also owned shares of the Class A preferred stock.

8. Under the new charter provisions which were printed on the back of the Class A preferred stock certificates and which have remained unchanged since the recapitalization in 1931, it is provided that the Class A preferred stock is callable in whole or in part by the directors at $105 per share plus accrued dividends, and it is also provided that any issued stock redeemed, purchased, or otherwise acquired by the corporation may be sold by the corporation at such price as may be fixed by the board of directors and subject to no restriction upon the right, based upon the financial history of the company or otherwise.

As distinguished from Class A preferred stock which the corporation purchased from the stockholders and was authorized to sell without any limitations, the corporation was authorized to issue new Class A preferred stock only when certain conditions as to earnings were met. When these conditions were met, the quantity of such new stock which might

be issued was limited by the past earnings. The charter of the company, as amended in 1931, specifically prohibited the reissuance of any stock purchased by the company from issues outstanding prior to the 1931 amendment to the charter.

As shown in finding 15, during the period from July 1, 1931, through 1937 the Retail Credit Company purchased or acquired 5,922 shares of Class A preferred stock. None of that stock was ever reissued and no additional shares of participating preferred nor any additional Class A preferred stock was issued during that period.

9. In July 1931 the Retail Credit Company arranged with DeKalb Securities Company to act as a sort of clearing-house or trading center for the Class A preferred stock and agreed to purchase from DeKalb Securities Company such stock as the Retail Credit Company might wish to retire at not more than $2 per share average price over the price paid by DeKalb Securities Company, an arrangement which with renewals thereof and changes therein remained in force until May 1935.

On January 27, 1932, the following resolution was adopted by the board of directors of the Retail Credit Company:

> *Be It Resolved*, That this Company do purchase from time to time all or any part of the shares of Class A Preferred stock of this Company not in excess of five hundred (500) shares, provided that the same may be purchased at not in excess of one hundred ($100.00) dollars per share and accrued dividends; said purchase to be made from those tendering the shares of stock.
>
> *Be It Further Resolved*, That the Treasurer of the Company is authorized to acquire all or any part of the above-mentioned five hundred (500) shares of Class A Preferred stock and to cancel the same and deliver the same to the Secretary.
>
> *Be It Further Resolved*, That the Secretary of the Company is authorized and directed to certify to the Transfer Agent of the Company the shares that have been so purchased and the number of the certificates evidencing the said shares; and is also authorized to deliver the canceled certificates for the said shares to the Transfer Agent. This shall be done by the Secretary from time to time as shares are acquired.
>
> *Be It Further Resolved*, That the shares so purchased shall be canceled, but that this shall be done without

prejudice to the right of the Company to reissue the same in accordance with the provisions of the charter of this Company.

January 27, 1933, and January 24, 1934, similar resolutions were adopted, each of which authorized the purchase and retirement of not in excess of 500 shares of Class A preferred stock.

10. October 3, 1934, the board of directors of Retail Credit Company adopted a resolution reading as follows:

> Whereas this Company now has outstanding 19,551 shares of Class A Preferred stock; and
>
> Whereas the Treasurer's report shows, and he recommends, it to be desirable to reduce this outstanding number of shares to 18,000, and further reports that there are sufficient funds in undivided profits to purchase 1,551 shares at $100.00 a share; be it
>
> *Resolved*, That $136,750.00 be set aside in reserve for the purchase and retirement of 1,551 shares of Class A Preferred stock. This amount plus amounts already set aside, and to be set aside for the remainder of the year under previous resolutions, will amount to $155,100.00; and be it
>
> *Further Resolved*, That the President of this Company be requested to make such arrangements with the DeKalb Securities Company (which Company now has a contract with the Retail Credit Company) to assure present holders of Class A Preferred stock not less than $99.00 per share for said 1,551 shares; such arrangements to terminate within one year, or sooner, if the said 1,551 shares shall have been purchased. Also to include a cancellation clause that will provide that the Retail Credit Company will take off of the hands of the DeKalb Securities Company such shares as it may then have.

11. The foregoing arrangement continued in effect until May 8, 1935, when the following resolution was adopted by the board of directors of the Retail Credit Company:

> Whereas the Finance Committee has stated that our Class A Preferred stock is not being purchased for retirement in the number of shares needed to complete our program within the year; and whereas it was recommended that we offer to purchase 1,127 shares of Class A stock of the Retail Credit Company, offering to the holders of such shares the call price of $105.

Resolved, That this Company offer to purchase direct, at the call price of $105 per share, a sufficient number of shares of its Class A stock to complete its financial program; therefore, be it

Further Resolved, That the Treasurer is authorized and is hereby directed to notify all Class A Preferred stockholders of its desire to purchase for retirement said shares; and whereas it has been moved, seconded, and resolved that the Retail Credit Company offer to purchase direct and not through DeKalb Securities Company shares of Class A Preferred stock to complete its program; therefore, be it

Resolved, That the Secretary write to DeKalb Securities Company requesting cancellation of the October 1, 1934, contract as of this date.

Pursuant to the directions contained in the above resolution, the treasurer of the Retail Credit Company sent a letter dated May 14, 1935, to all holders of Class A preferred stock, which read as follows:

By Resolution of our Board of Directors, as of 5–8–35, I am directed to offer Holders of our Class A Preferred Stock $105 per share, for all, or any part, of their holdings of such stock. This offer to hold good until further notice is given.

The Company wishes to retire the stock to be purchased under this offer. It could call, at $105 per share, such shares as it needs to complete its financial program, but by offering now the full call price those who wish to sell may take advantage of the offer.

If you wish to sell any of your stock at $105 per share, date and endorse your stock certificate just as it was issued, have your signature witnessed and guaranteed by a bank or trust company, and send it by registered mail to Mr. C. D. Harrison, Assistant Treasurer, with instructions as to the number of shares you are selling.

Immediately upon receipt of certificate properly endorsed, check will be mailed for the purchase price and any shares not desired sold returned to you.

12. During the years 1931 to 1935, inclusive, DeKalb Securities Company purchased from stockholders 3,701 shares of Retail Credit Company Class A preferred stock at prices ranging from $83.50 to $99 per share. Of the shares purchased, 492 were sold by DeKalb Securities Company to individuals and 3,209 were sold to the Retail Credit Company at prices ranging from $84.50 to $100 per share.

Following the resolution of May 8, 1935, the Retail Credit Company purchased the following Class A preferred stock from stockholders offering their stock for sale:

1935	825 shares
1936	492 shares
Total	1, 317 shares

13. In January 1937, without prior authorization from the board of directors, officers of the Retail Credit Company purchased on behalf of that company from stockholders offering their stock for sale 1,111 shares of Class A preferred stock at $105 per share. The minutes of the board of directors for January 27, 1937, contained the following approval of that action:

> The Treasurer brought to the attention of the Directors that eleven hundrel eleven shares of Class A Preferred shares of the Retail Credit Company has been offered for sale by some of the stockholders at $105 per share and had been purchased and retired by the Company since January 1, 1937, and that other shares would likely be offered during the year; whereupon it was moved, seconded, and unanimously
>
> Resolved that the purchase and retirement of eleven hundred eleven shares of Class A Preferred stock at $105.00 per share since January 1, 1937, is hereby ratified and confirmed; and be it
>
> Further Resolved that the Treasurer be, and he is hereby, authorized to purchase, if offered, for retirement up to five hundred additional shares of Class A Preferred stock at $105.00 per share during 1937.

14. All Class A preferred stock purchased by the Retail Credit Company through 1937, since it began to purchase direct from stockholders on May 8, 1935, may be classified as to the number of purchases as follows:

Purchased from—	1935	1936	1937
Stockholders owning 1 share	20	11	5
Stockholders owning 2 shares	14	3	5
Stockholders owning 3 to 5 shares	19	5	9
Stockholders owning 6 to 15 shares	22	10	6
Stockholders owning 16 to 30 shares	13	2	1
Stockholders owning over 30 shares	1	3	5
Total	89	35	31

Stockholders who sold more than 30 shares were as follows:

Year	Name	Number of shares owned	Number of shares sold	Per cent
1935	E. J. Hyde, retired	550	200	36+
1936	Trust Company of Ga., Trustee	1,120	151	13+
"	James C. Malone	599	99	16+
"	H. L. Allen	92	67	73+
1937	Trust Company of Ga., Trustee	960	545	56+
"	Trust Company of Ga., Trustee	1,090	545	50
"	E. J. Hardin	40	40	100
"	Walter C. Hill	74	74	100
"	Louis S. Brooke	200	50	25

15. The following tabulation shows the total Class A preferred stock issued July 1, 1931, by the Retail Credit Company and the purchases of that stock by that company from the date of issuance through and including December 31, 1937:

		Shares
Class A stock issued July 1, 1931		22,296
Class A stock purchased through December 31, 1937:		
From DeKalb Securities Co.:		
1931	300	
1932	975	
1933	1,105	
1934	502	
1935	327	
From Individuals:		
1935	825	
1936	492	
1937	1,396	
Total		5,922
Outstanding December 31, 1937		16,374

The Class A preferred stock of the Retail Credit Company purchased by that company during the period from July 1, 1931, to December 31, 1937, inclusive, was not in proportion to the holdings of common or preferred stock of the stockholders of that company, and had no relation to the comparative amounts of common or preferred stock held by the stockholders who sold such stock.

The only subsequent purchases by the Retail Credit Company of Class A preferred stock through December 31, 1943, were:

131 shares in 1938 at $100 per share
243 shares in 1939 at $100 per share
81 shares in 1943 at $100 per share

The Retail Credit Company's accumulated earnings and profits were sufficient at all times to cover all dividend distributions and redemptions of the Class A preferred stock without impairment of its capital or any reduction of its business activities.

16. From July 1, 1931, through the calendar year 1937, the Retail Credit Company redeemed no common stock and the 104,703 shares of common stock originally issued remained outstanding.

17. The Retail Credit Company was not reducing its business during the period 1931 to 1943, inclusive, and was not acquiring its Class A preferred stock for the purpose of reducing its activities or liquidating its business. The number of its employees was increasing yearly from 1,445 at the end of 1931 to 2,568 at the end of 1940, and its average sales increased from $6,238,612 in 1931 to $8,137,013 in 1940. Its total net earnings over the period from 1929 to 1938, inclusive, were $5,595,263.55, and it paid cash dividends during that period of $4,227,653.14. It had earnings in 1937 of approximately $599,000 and paid cash dividends in that year of approximately $570,000.

The capital stock, surplus, and undivided profits of the Retail Credit Company at December 31, 1930, June 30, 1931, December 31, 1936, and December 31, 1937, were as follows:

	Dec. 31, 1930	June 30, 1931	Dec. 31, 1936	Dec. 31, 1937
Preferred Stock 7% and 8% (Ret. July 1, 1931)	$192,700.00	$196,500.00		
Participating Pref. Stock (Ret. July 1, 1931)	897,380.00	895,630.00		
Class A Preferred (Issued July 1, 1931)			$1,777,000.00	$1,637,400.00
Common stock	151,700.00	151,400.00	523,515.00	523,515.00
Surplus (including Capital Surplus)	524,540.00	523,515.00	529,395.60	550,822.29
Undivided Profits	310,406.27	389,531.53		
Total	2,076,726.27	2,156,576.53	2,829,910.60	2,711,737.29

18. On July 1, 1931, Cator Woolford owned 33,373 shares of common stock of the Retail Credit Company and on that date he received thereon as stock dividend 6,674$\frac{3}{5}$ shares of the company's Class A preferred stock. On that date he purchased $\frac{2}{5}$ths of a share of the Class A preferred stock, making the total of such shares held by him 6,675. By the end of 1936 he had made gifts to his family of 6,900 shares of the common stock, and in the years 1932 to 1935, inclusive, he sold 16,600 shares of the common stock to employees of the company, retaining only 9,873 shares. By the end of 1939 he had made gifts of 2,600 shares of Class A preferred stock, and at the end of that year retained 4,075 shares.

19. On August 20, 1935, Cator Woolford created the trust of which plaintiffs are trustees, the trust property consisting of 1,150 shares of Class A preferred stock, 3,450 shares of common stock of the Retail Credit Company, and $8,500 in cash. During the period from the creation of the trust until the end of 1940, plaintiffs sold all of that common stock to employees of the Retail Credit Company at prices ranging from $35 to $50 per share. In 1936 plaintiffs disposed of 60 shares of the Class A preferred stock to the Retail Credit Company and, on January 14, 1937, disposed of 545 shares of that stock to that company. On March 2, 1944, plaintiffs still retained the other 545 shares of Class A preferred stock.

Section 11 of the trust instrument reads as follows:

> 11. A part of the corpus of this trust estate consists of shares of common and preferred capital stock of Retail Credit Company, a corporation under the laws of Georgia. It is not deemed by the grantor wise that this trust estate be largely interested in said shares from either its own or Retail Credit Company's standpoint. Grantor also recognizes that it may take a substantial period of time to market said shares of this stock, especially the shares of common stock which he is conveying to this trust estate. Grantor directs the trustee to dispose of said shares of common stock in one or more lots for cash or on terms and to cooperate with the Retail Credit Company in the disposition of the said shares of common stock and in the retirement of the shares of preferred stock.
>
> The powers as to the shares of stock of Retail Credit Company herein conferred shall apply to both the shares

of common and preferred stock, though it is best that the common stock be disposed of first. The Trustees are authorized to await the retirement by the company of the shares of preferred stock if and to the extent it in the exercise of ordinary care shall deem it wise so to do.

20. Included in the purchases heretofore referred to as having been made by the Retail Credit Company directly from stockholders in 1937 were the 545 shares of Class A preferred stock which the Retail Credit Company purchased from plaintiffs on January 14, 1937. That stock had a basis for tax purposes of $7,771.70—that is, $14.26 per share—and plaintiffs received therefor from the Retail Credit Company a total payment of $57,225—that is, $105 per share. In making the transfer to the Retail Credit Company of that stock, plaintiffs endorsed stock certificate No. 1096, representing 816 shares of Class A preferred stock, as follows:

> For value received __________ hereby sell, assign, and transfer (to) for cancellation—545—for reissue in same name—271—shares of the stock represented by the within certificate and do hereby irrevocably constitute and appoint C. A. Allen to transfer the said stock upon the books of the within-named corporation with full power of substitution in the premises.
>
> (Signed) JAMES E. DICKEY,
> TRUST COMPANY OF GEORGIA,
> By WILLIAM HUNTER,
> *Vice President*,
> By JAMES C. SHELOR,
> *Trust Officer*,
> *as Trustees for Charlotte Louise Woolford u/a dated 8/20/35.*

The Trust Company of Georgia, transfer agent for stock of Retail Credit Company, inserted certificate No. 1096 in the stock book, stamped it

Cancelled
January 16, 1937
Trust Company of Georgia

and issued to plaintiffs a certificate No. 1158 for 271 shares. No certificate was issued covering the 545 shares transferred to the Retail Credit Company.

The stamp appearing on the foregoing certificate is the regular stamp of the Trust Company of Georgia, as transfer

agent, which it places on all certificates turned in to it, whether the stock represented by the certificate is to be reissued in other certificates to the holders, or no certificates representing the stock are to be issued.

The foregoing disposition of the 545 shares of Class A preferred stock was made by plaintiffs on their own volition in order to diversify the investment of the trust, and without any compulsion from the Retail Credit Company.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The question presented in this case is the extent of the taxability of the gain derived in 1937 from the redemption by the Retail Credit Company of 545 shares of its own Class A preferred stock held by plaintiffs. The taxpayers claim that the gain is taxable as a capital gain to the extent of 30 percent as an ordinary sale of stock held for more than 10 years. The Commissioner taxed it at normal and surtax rates to the extent of 100 percent, on the theory that the gain was an amount "distributed in partial liquidation."

The facts surrounding the transaction are as follows: Prior to May 25, 1931, the Retail Credit Company of Atlanta, Georgia had outstanding 89,738 participating preferred shares of stock and 15,170 shares of common stock, each with full voting rights. The company decided to rearrange its capital structure so as to permit those who were in active management of the business to retain control of the company through ownership of the common stock and to give to other stockholders not in active charge of the management preferred stock having no voting rights. Accordingly, a resolution was adopted on April 27, 1931 authorizing such an amendment of the charter of the company, which was approved by the Superior Court of Fulton County, Georgia on May 25, 1931.

The amended charter authorized the issuance of 150,000 shares of no par value common stock and 50,000 shares of no par value Class A preferred stock. One share of the Class A preferred stock was to be issued for every five shares of the old participating preferred stock.

The Board of Directors was authorized to redeem any particular shares of the Class A stock it desired without pro rata restrictions, and to resell it at such price as might be fixed by the Board of Directors.

By proper resolutions of the Board of Directors the provisions of the charter were put into effect. The participating preferred stock was redeemed and one share of Class A preferred stock was issued for each five shares thereof. The common stock remained as before except that there was declared thereon a stock dividend of one share of Class A preferred stock for each five shares of common.

After the amendment of the charter Cator Woolford was the owner of both common stock and Class A stock of the company. On August 20, 1935, he transferred to plaintiffs in trust 1,150 shares of the Class A stock and 3,450 shares of the common stock, with authority to sell it according to a stated plan. By 1940 plaintiffs had sold all the common stock to employees of the company. They sold to the company itself 60 shares of the Class A stock in 1936 and 545 shares in 1937. The extent of the taxability of the gain derived from the sale of the 545 shares in 1937 is the question presented.

On the first of the year following the year the recapitalization was put into effect the Board of Directors authorized the company treasurer to purchase from anyone wishing to sell not more than 500 of the 22,296 outstanding shares of Class A stock at not more than $100 a share plus accrued dividends. Similar resolutions were passed in the two succeeding years. On October 3, 1934, a resolution was passed offering stockholders who might wish to sell some or all their Class A stock not less than $99.00 per share therefor.

By May 8, 1935, a total of 3,701 shares had been purchased at prices ranging from $84.50 to $99.00 per share.

On May 8, 1935, the company, pursuant to resolution of its Board of Directors, wrote all its stockholders offering to purchase up to 1,127 shares of this stock at $105.00 per share, the call price. In 1935 and 1936 there were purchased 1,317 shares. In 1937 an additional 1,111 shares, including 545 of plaintiffs', were purchased without previous authorization from the Board of Directors, but this was ratified later.

By the end of 1937 a total of 5,922 shares had been purchased, leaving outstanding 16,374 shares.

The purchases were from anyone wishing to sell and the amount purchased had no relation to the amount of the stock held by the seller. Purchases from stockholders owning more than 30 shares ranged from 13 per cent of their holdings to 100 per cent, and the prices paid ranged from $84.50 to $105.00.

The question is whether the sale by plaintiffs of one-half of their stock in 1937 comes within any of the provisions of section 115 of the Revenue Act of 1936 dealing with distributions of corporate earnings by corporations. The Commissioner treated the sale as a partial liquidation as defined in subdivision (i) and, hence, taxable as provided in subdivision (c).

Section 115 of the Revenue Act of 1936 (49 Stat. 1648, 1687), deals with "distributions by corporations." Subsection (a) defines a "dividend" as follows:

> The term "dividend" when used in this title * * * means any distribution made by a corporation to its shareholders * * * (1) out of its earnings or profits accumulated after February 28, 1913 * * *.

By section 22 of the Act the entire amount received as dividends is required to be included in gross income and is subject to both normal and surtax.

Subsection (c) [1] deals with "distributions in liquidation." It provides:

> * * * amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under Section 111, but shall be recognized only to the extent provided in Section 112. Despite the provisions of Section 117 (a), 100 per centum of the gain so recognized shall be taken into account in computing net income, except in the case of amounts distributed in complete liquidation of a corporation. * * * In the case of amounts distributed * * * in partial liquidation * * * the part of such distribution which is

[1] Subsection (b) of section 115 is not material to our inquiry.

properly chargeable to capital account shall not be considered a distribution of earnings or profits.

* * * * *

This made the gain derived on a partial liquidation taxable on the same basis as ordinary dividends.

Subsection (d) is concerned with "other distributions from capital." It provides that if the distribution is not in partial or complete liquidation and is not out of increase in value of property before March 1, 1913, and is not a dividend, then it is to be taxable, to the extent of the gain derived, as a gain from the sale or exchange of property, that is, as a capital gain. Such a distribution not being in the nature of a dividend is not taxable on the same basis as one.

Thus the statute recognizes that a corporation may acquire its own stock without the transaction being either a dividend or a partial liquidation.

Subsection (g)[2] relates to "redemption of stock." It is quoted in full:

> *Redemption of stock.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

Such a redemption, being essentially equivalent to a dividend, was made taxable as one.

Subsection (i)[3] reads:

> *Definition of Partial Liquidation.*—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

From a reading of the section it seems to us that Congress' intention in the enactment of this whole section was to tax

[2] The intermediate subsections are not relevant.
[3] Subsections (h) and (j) are not material.

dividends at normal and surtax rates and to prevent tax avoidance by taxing as dividends any distribution of earnings or profits of a corporation which was the equivalent of a dividend, in whatever guise distributed.

Ordinarily a distribution of corporate earnings is in the form of a dividend, but Congress recognized that profits might be distributed in other forms, and so escape the tax on dividends, and thus in the various subsections Congress dealt with various transactions which were in the nature of dividends and provided that when the distribution took on that character it was taxable as such; otherwise, not.

One form in which earnings might be distributed in lieu of a dividend is by partial liquidation of the corporation, as in a case where the corporation has accumulated more assets than it needs to carry on its business, or where it wishes to curtail its activities. Where the corporation desires to liquidate in part, a certain proportion of the stockholdings of each stockholder is called in and in lieu thereof the assets of the corporation are "distributed" to them in proportion to the stock turned in. This contemplates, of course, a proportionate reduction in the stockholdings of each stockholder, either in one transaction or in a series of transactions. It contemplates equal treatment of all stockholders in proportion to their stockholdings. It contemplates a "distribution" among all the stockholders of the corporation's assets in proportion to their stockholdings. Indeed, the entire section 115 deals with "distributions" by corporations, that is, a division among the stockholders of corporate assets. It had in mind the taxation of a distribution of earnings as dividends and the taxation of schemes evolved to escape the tax on dividends.

If this is correct, then it is plain that a corporation's dealings with a lone stockholder, or any number of them less than all, does not come within the ambit of the section. This being the intention of Congress, it was accordingly provided in subsection (d) that if a distribution was made which was not in partial liquidation or was not a dividend, it was taxable only as is the gain from a sale or exchange of property. It was thus recognized that a corporation might acquire its stock in a transaction which did not amount to a distribu-

tion of earnings equivalent to a dividend. If so, it was not taxed as such.

This intention is further shown by subsection (g). This section provides for the taxation, on the same basis as dividends, of only those redemptions of stock which are "essentially equivalent to the distribution of a taxable dividend." The purchase of stock from a sole stockholder bears not the slighest resemblance to the distribution of a dividend.

If plaintiffs had sold the stock in question to anyone other than the corporation, the gain derived would have been taxable as a capital gain only to the extent of 30 percent thereof. For what reason would Congress have desired to tax the gain at normal and surtax rates to the extent of 100 percent if the sale was to the corporation itself? We can think of none, unless the gain was essentially equivalent to a dividend, which was so taxable. A gain derived by one stockholder only has none of the elements of a dividend.

It is true, of course, that if all the purchases by the corporation taken together accomplish the same result as the declaration of a dividend, the gain derived would be taxable as would a dividend; but that is not the case here. Some stockholders of the Retail Credit Company got $83.50 for their stock and others got prices ranging up to $105.00. Some stockholders sold all their stock, some one-half of it, and some much less, and presumably some sold none. The company's stockholders, therefore, did not share in the earnings of the company in proportion to their stockholdings, as they are entitled to do in the case of a distribution of a dividend or any distribution in the nature of a dividend.

That this is a correct interpretation of the intent of Congress is shown by the report of the Finance Committee of the Senate on the 1934 Act (Sen. Rep. No. 558, 73rd Cong. 2d Sess. p. 37), which first carried this provision. It reads in part:

> Under existing law a distribution in liquidation of a corporation is treated in the same manner as a sale of stock. This rule has serious objections, as it permits wealthy stockholders to *escape surtax upon corporate earnings or profits distributed in the form of liquidating dividends* * * *. Your Committee recognizes that liquidating dividends do contain some of the ele-

> ments of a sale in that the shareholder is relinquishing in whole or in part his investment in the corporation. On the other hand, they also contain *some of the elements of an ordinary dividend insofar as they represent a distribution of corporate earnings or profits.* * * * The House bill retains the principle of the present law of taxing to the shareholder only the amount by which the liquidating dividend exceeds the basis of the stock with respect to which the dividend is paid. *However, to prevent avoidance of surtax through liquidating dividends, the gain to the shareholder is made subject to both normal and surtax.* This is accomplished by taxing the gain in the same manner as if it were a gain from the sale * * * of a capital asset held for not more than one year, even though the shareholder may have actually held the stock upon which the dividend is paid for a longer period. [*Italics supplied.*]

This is further shown by the Senate Finance Committee Report on the 1942 Act (Sen. Rep. No. 1631, 77th Cong. 2d Sess. p. 116). This reads in part:

> Under existing law * * * the gain realized from a distribution in partial liquidation is treated, despite the provisions of Section 117, as a short-term capital gain. *This treatment was occasioned by the facility with which ordinary dividends may be distributed under the guise of distributions in partial liquidation,* although Section 115 (g) makes explicit provision for the treatment of such distributions as ordinary dividends. *Inequality results, however, under the existing law in the case of unquestionable bona fide redemptions of stock not equivalent in any way to the distribution of a taxable dividend.* It is believed that the proper application of section 115 (g) will prove adequate to prevent *taxable dividends disguised as liquidations* from receiving capital gain treatment. Accordingly, this section of the bill eliminates the provision requiring the gain from a partial liquidation to be treated as a short-term capital gain. [Italics supplied.]

Not only does the transaction in this case not come within the spirit of the section, neither does it come within the letter of it. Subsection (i) defines a partial liquidation as "a distribution by a corporation in complete cancellation or redemption of a part of its stock." When a corporation purchases and retires and completely cancels one share of

its stock, it *pro tanto* liquidates, but there has been no "distribution" of its assets in liquidation. It is only a "distribution" in liquidation with which subsections (c) and (i) are concerned. Furthermore, subsection (i) defines "amounts distributed in partial liquidation" as a distribution in "complete" cancellation or redemption of a part of its stock. Not only was there no "distribution" of assets among all the stockholders of the Retail Credit Company, but also there was no "complete" cancellation or redemption of the stock. As plaintiffs say, it was the certificates of stock that were cancelled; the stock was not. Under the amended charter the directors had the right to resell the stock at any time, at any price, without limitation. This charter provision was never amended or repealed. So long as it was in effect, the stock was not cancelled. There could be no "complete" cancellation of this stock so long as this charter provision remained in effect. *Knickerbocker Imp. Co.* v. *Board of Assessors*, 74 N. J. Law, 5832.

The transaction, therefore, does not come within the letter of subdivision (i) and, for the reasons stated above, we do not think it comes within its spirit.

The Circuit Court of Appeals for the Fifth Circuit in *Hill* v. *Commissioner*, 126 F. (2d) 570, held that the gain derived in a similar transaction was subject to tax at the normal and surtax rates. Its decision was based alone on the premise that the transaction came within the letter of subsection (i). For the reasons stated, we do not think it does.

Defendant also cites *Cohen Trust* v. *Commissioner*, 121 F. (2d) 689. In that case the company offered to purchase 10,000 of the 11,116 shares of its outstanding preferred stock. A total of 8,705 shares were acquired, and then the balance of the stock was called and the charter of the company was amended so as to eliminate from its capital structure all of this class of stock. All of the stock was purchased and called at the same price. Here there was a "complete cancellation" of the stock. The facts of that case and in the one at bar are essentially different.

We are of opinion plaintiffs are entitled to recover the sum of $11,730.41 with interest as provided by law from October

19, 1939. Judgment for this amount will be entered. It is so ordered.

Whaley, *Chief Justice*, concurs.

Littleton, *Judge*, concurring: Defendant appears to rely upon the number of acquisitions by the Retail Credit Company of its Class A preferred stock in support of its position that the amounts paid for such stock were distributions in partial liquidation, but there is nothing in the record to show or indicate that there was any concerted action or intention on the part of the company and the stockholders or that there was any intention or scheme by the corporation, or by any stockholder, such as was contemplated by Congress in sec. 115, to enable any stockholder to escape normal and surtax on the profit derived from the sale of stock by using the capital gains provision of the taxing act on distributions in the nature of dividends. So far as the evidence shows, the Retail Credit Company simply decided to acquire some of its outstanding Class A preferred stock, not for the purpose of completely cancelling it, but subject to reissuance or sale. It had a right under the statute to do this without rendering the gain to the stockholder taxable one hundred percent as a dividend. Reissuance or sale of treasury stock so acquired gives rise to a taxable gain or a deductible loss to the corporation. *Edwin L. Wiegand Co.* v. *United States* (decided this day) and cases therein cited. [*Ante*, p. 111.]

There is a complete absence of any evidence to show that in purchasing the Class A stock from certain stockholders who were willing to sell it the Retail Credit Company did so for the purpose of completely canceling and retiring the stock. It must be assumed that Congress was aware of the fact disclosed by numerous published decisions relating to income taxes that corporations frequently acquire their own stock and hold it as treasury stock subject to reissue or resale; that, in so acquiring stock, they often cancel the certificates but do not completely cancel the stock as such; that corporations also frequently reissue or resell such stock. It must also

be assumed that when Congress enacted the Revenue Act of 1936, in subsection (c) of which it inserted the provision relied upon by defendant which related to amounts distributed in partial liquidation, i. e., "despite the provisions of sec. 117 (a), 100 percentum of the gains so recognized shall be taken into account in computing net income," it was aware of the Treasury Regulation, art. 543, regs. 65, in effect from May 2, 1934, that a resale by a corporation of its own stock results in a taxable gain or a deductible loss. From this it must be concluded that Congress did not intend that such acquisitions or bona fide redemptions of stock should, standing alone, be treated as distributions in partial liquidation, and that it was for this reason that sec. 115 (i) defined a distribution in partial liquidation as being a distribution "in complete cancellation or redemption of part of its stock." The instant case is therefore, on its facts, excluded by sec. 115 (i) from the provisions of 115 (c) upon which the defendant relies.

The gain received by plaintiffs from the sale of the 545 shares of stock in question would, of course, be taxable 100 percentum under sec. 115 (g), even though the stock was not completely cancelled, if defendant had been able to submit sufficient evidence to show that in acquiring the stock the Retail Credit Company cancelled or redeemed it at "such time and in such manner as to make the distribution and cancellation or redemption essentially equivalent to a taxable dividend," but we have no such evidence and there is no basis in the facts of record for the inference that, in so acquiring the stock, there was present a scheme to make distributions in partial liquidation in the guise of purchasers of stock, and thereby enable the stockholders to escape or avoid the full normal and surtax on amounts which were in effect "distributions."

We are not, therefore, justified in finding that the transaction in question was a distribution by the Retail Credit Company in partial liquidation within the meaning of sec. 115 (c), (g), or (i). Plaintiffs are therefore entitled to the benefit of the capital gain provision of the taxing act.

MADDEN, *Judge*, dissenting:

Our question is whether the payment made in 1937 to the plaintiffs for their stock was, in the circumstances here present, a "distribution by a corporation in complete cancellation or redemption of a part of its stock * * *," which is the definition given in Section 115 (i) to the words "amounts distributed in partial liquidation" which are used in subsection (c) of that section in the Revenue Act of 1936, which subsection required the profits included in amounts so "distributed" to be returned 100% for taxation no matter how long the stocks had been held.

The court holds that their transaction is not covered by the statutory language; that the transaction did not result in "complete cancellation or redemption of a part" of the corporation's stock, because of the provision of the amended charter that any issued stock redeemed, purchased, or otherwise acquired by the corporation might be sold by the corporation at whatever price the board of directors fixed. This provision, the court holds, made the stock purchased from the plaintiffs and others "treasury stock" not completely cancelled or redeemed. I do not agree. The board of directors, in its resolution of October 3, 1934, expressed its intention to reduce the number of shares of preferred stock to 18,000, and in its resolution of May 8, 1935, authorized its treasurer to notify all holders of Class A preferred stock of its offer to "purchase for retirement" a sufficient number of shares "to complete its financial program." That the directors intended to eliminate the purchased shares from the corporation's financial structure is plain. Stockholders who, like the plaintiffs, also owned common stock of the corporation might well have been willing to sell their preferred stock for retirement, when they would not have been willing to sell it for reissue to compete for the future earnings of the corporation, or to compete in the market with the shares of preferred stock which the stockholders retained. The officers of the corporation did "cancel" the stock as effectively as that could be done by physical acts. None of it was ever reissued.

If a taxing body had imposed a per share tax on the corporation's capital, surely it would not have been taxable on

these shares. I think the provision in the amended charter authorizing the corporation to reissue acquired stock was intended only to remove any legal question as to whether the mere acquisition by the corporation of its own stock would, *ipso facto*, prevent its reissue, and was not intended to tie the corporation's hands so that it could not, if it so desired and intended, cancel some of its stock. The provision in the resolutions adopted in January of 1932, 1933, and 1934 that the shares purchased under those resolutions should be cancelled, but without prejudice to the right of the corporation to reissue them, was omitted from the resolution of October 3, 1934, and subsequent resolutions, and its omission, in connection with the language and conduct which followed, shows, I think, that the corporation intended to "completely cancel" the shares acquired thereafter.

The court holds that the statutory language of Section 115 (c) and (i) does not fit the transaction here involved because the payment made to the plaintiffs was not a "distribution" but was the mere payment of a price for the purchase of some shares. In the statute, Congress was dealing with a number of different kinds of dispositions by a corporation of its accumulated earnings, and was attaching different consequences, *in re* taxability, to them. It was, it seems, seeking a neutral word which would not, in itself, connote that the disposition referred to was a dividend, or so like a dividend that it ought to be taxed as such, or was a mere payment of a purchase price, which ought to be taxed like the sale of a horse. Congress was devising a meticulous statutory scheme for dealing with the problem of the disposition by corporations of their accumulated profits to their stockholders, as distinguished from their spending those profits with outsiders. I can think of no generic word more suitable for the purpose than the word "distribution."

That Congress did not use the word "distribution" in the sense of the payment of a dividend is evident, since dividends ordinarily regarded as such, and by the statute taxed as such, are only one of many kinds of payments dealt with by Section 115, whose heading is "Distributions by Corporations." And Section 115 (g), in providing for the special treatment of a "distribution" in cancellation of stock which,

because of its time and manner, is essentially equivalent to the declaration of a taxable dividend, recognizes that many other "distributions" are not dividends or their equivalents. The only other meaning, narrower than "payment," which occurs to me for possible application to the word "distribution" in this connection, is "*pro rata* payment" among all holders of the stock in question. But that would mean that if a corporation had reserved the right to call for retirement a specified number of its shares, at one time, or at specified times, by lot, or by selection made by the board of directors, the payments would not be "amounts distributed in partial liquidation" nor taxable as such under Section 115 (c). Yet I have no doubt that such payments would be so taxable. The final call which would bring in all the remaining outstanding shares of the kind subject to call would, by any possible meaning of the word "distribution," be taxable as a "partial liquidation" under Section 115 (c). I see no reason why those stockholders should be taxed three times as much as the ones whose stock was called earlier.

The plaintiffs' stock was not called *pro rata*, or by lot, or by selection of the board of directors, or at all. It was purchased as a result of a general offer made by the corporation to its stockholders, which reminded them that it could call their stock, but that instead it was offering the call price to those willing to sell. It thus offered an opportunity for self-selection, and the plaintiffs sold a part of their stock. If after having purchased all the stock it could get from willing sellers, the corporation had needed more and had called it *pro rata* from all stockholders, that would have been a "distribution," but it would be hard to find a reason why the stockholders, including the plaintiffs, should pay three times as much taxes on their surrenders of stock in response to the call as on their earlier sales.

The court's decision really, it seems to me, is aimed at the equity and wisdom of Section 115 (c) of the 1936 Act. That the criticism has validity is shown by the fact that Congress repealed the part of it here in litigation in 1942. Its apprehension, in 1936, that dispositions by corporations to their stockholders were so fraught with possibilities of evading taxes that so-called "partial liquidations" must be taxed sub-

Syllabus

stantially like ordinary income, yielded in 1942 to recognition that real evasions could be adequately taxed under Section 115 (g), and that other partial liquidations belonged, in fairness, with complete liquidations, in the taxing scheme. But the nonretroactive repeal in 1942 of the provisions of the statute under which the plaintiffs were taxed in 1937 is not a reason why we should now give the former statute a narrower construction than we would have done before it was modified.

JONES, *Judge*, took no part in the decision of this case.

GEORGE A. FULLER COMPANY v. THE UNITED STATES

[No. 44011. Decided June 4, 1945]

On the Proofs

Government contract; extra work; damages for delay.—The plaintiff entered into a contract to construct a conservatory for the Government, to be built along novel and monumental lines, being somewhat of an experiment for which all of the details were not determined before performance began. Suit was was brought for work alleged to be extra and for damages for delay, the claims concerning these items: pile-driving, leveling the site, top-soil, reinforcing the dome, experimental work, and the installation of an extra belt course and rafter caps.

The claim involving pile-driving was denied, on the ground that both plaintiff and defendant were at fault.

Leveling the site, it was *held*, was the responsibility of defendant, which failed to perform the work, and plaintiff was entitled to recover for the work performed.

Although the Government did not furnish the top-soil at the scheduled time, it was *held* that no delay in performance occurred and plaintiff was not entitled to recover for that item.

After the dome of the conservatory had been constructed according to specifications, the engineer decided it would have to be reinforced; it was *held* that plaintiff was entitled to recover the cost of the structural aluminum necessary for the reinforcement in accordance with the price set forth in the contract, plus $100 for the labor involved.

It was *held* that plaintiff was entitled to recover the cost plus profit for the experimental work performed, and for the extra belt course and rafter caps installed.

Plaintiff, it was *held*, was entitled to recover for delay in the instance of one delay which was unreasonable and clearly the fault of the Government. Recovery for other delays was denied, since the contractor knew that the plans were incomplete and that the contract was for a novel type of construction.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *King and King* were on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation of the State of New Jersey.

2. On June 9, 1931, the plaintiff and the defendant entered into a written contract whereby for the consideration of $604,000 the plaintiff agreed to furnish all labor and materials, and perform all work required for the construction of a conservatory for the United States Botanic Garden, Washington, D. C., in accordance with designated specifications, schedules, and drawings, made a part of the contract. The work was to be commenced within 10 calendar days after receipt of notice to proceed, and be completed within 270 calendar days from that date. The contracting officer for the defendant, signing the contract, was David Lynn, Architect of the Capitol (hereinafter to be referred to as the Architect). Notice to proceed was received by the plaintiff June 16, 1931, which fixed the date for completion on or before March 12, 1932.

Paragraph No. 1, Section I of the contract specifications, provided:

> The terms "Architect", or "Contracting Officer" as used in these Specifications shall mean the Architect of the Capitol. In the supervision of construction of the building he shall be represented by Bennett, Parsons and Frost who are authorized to act for him. The term "Contractor" shall mean the General Contractor who shall have been awarded and who shall have accepted a contract to do the entire work designated. In each of the above cases the defined term shall also apply to a duly authorized agent of the party designated except that an order by a representative of the Architect, in-

volving extra work shall be valid only when in accordance with the contract and signed by the Architect.

Bennett, Parsons & Frost will be hereinafter referred to as the supervising architects.

The contract with its specifications, in evidence, is made part of these findings by reference.

At the time the contract was let to the plaintiff plans for the project had not been wholly developed, and the developmental condition lasted substantially until the work was finally completed.

The defendant furnished bidders, including the plaintiff, printed special instructions, Articles Nos. 1 and 4 of which were as follows:

> 1. Bidders are particularly requested to note that it has been decided to attempt to make use of the especial adaptability and advantages of aluminum for glazing bar elements and certain structural elements of the proposed building because of the lightness, strength, ease of handling and working and the resistance to corrosion of this metal. To this end much study has been given and an effort made to develop economical methods of assembling standardized, extruded aluminum sections, each designed to accomplish several purposes in one piece. The base bid drawings have therefore been modified to indicate the use of aluminum for glazing and structural purposes. Bidders are requested to make a careful and detailed study of this matter with a view to economically attaining a superior job. In this effort, they will have the utmost cooperation of the staffs, including research laboratory, of the manufacturers of the material.
>
> 4. *The time.*—The time for the completion of the contract shall be 270 calendar days from the date of receipt of notice to proceed.

3. Articles Nos. 3 and 5 of the contract are as follows:

> Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writ-

> ing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.
>
> Article 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

4. *Leveling site, $1,340.00.*—Paragraph No. 1, Section II of the specifications, provided:

> 1. *Site.*—The conditions which will exist at site at the beginning of the work included in this contract are as follows:
>
> All buildings, including their foundations, footing, and basement floors, masonry walks, drives, etc., inside street walk lines will have been removed by the Government.
>
> All the cellars and similar depressions will have been filled with excavated material from other sites and the surface of this site will have been made generally on an even grade between inner edges of existing street sidewalks.

The plaintiff company commenced work promptly. They found the conditions at the site did not exist as recited in Paragraph No. 1 of Section II of the specifications above quoted. Instead, surface elevations varied greatly. There had been a gasoline station on the premises, with underground tanks and other fixtures usual to an automobile service station.

The plaintiff company began excavating with a steam shovel June 19, 1931. Their representative on the site orally complained to defendant's representative there of the condition of the site due to its not having been cleared and leveled.

The Fuller Company nevertheless proceeded with the contract work. They did not clear the site of debris. That

work was later performed by the defendant. The plaintiff did not level off the site in the manner that such leveling was required of the defendant by the contract, but cut and filled as occasion demanded. A small amount of dirt was trucked away for the convenience of a nearby Government project; the defendant brought in a small amount for the benefit of the plaintiff. The net excess of fill brought in by the plaintiff, to make up for the defendant's failure to level the site, was 1,340 cubic yards. A rate of $1.00 per cubic yard is not in excess of fair remuneration for the fill so brought in, which amounts to $1,340.00, which plaintiff has not been paid.

After plaintiff had complained of the condition of the site, as above related, and no action had been taken, the plaintiff, July 16, 1931, wrote the Architect as follows:

> Kindly arrange to have the Harris Wrecking Company clear the lot of tanks, pumps and other material scattered on the Northeast section of site and have the lot leveled off to sidewalk grade as specified, at the earliest possible date.

On the 18th of July, 1931, the Architect gave assurances to the plaintiff of compliance with this request.

The plaintiff again in writing August 14, 1931, called the attention of the Architect to the lack of grading, stating that it was being done at the plaintiff's expense, under a "give-and-take" attitude, which was not being reciprocated by the defendant.

September 23, 1932, the plaintiff issued to the Architect a formal proposal for the work, stating it at 1,415 cubic yards of earth fill for leveling site, $1,415 at $1.00 per cubic yard. On the recommendation of the supervising architects the Architect formally rejected the proposal October 11, 1932, in part on the ground that Article 4 of the contract had not been complied with as to time of complaint.

Article 4 of the contract was as follows:

> Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the at-

tention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

The conditions here complained of were neither subsurface nor latent and plaintiff directed the attention of the contracting officer to them while they existed.

5. *Pile-driving.*—The contract called for the driving of numerous piles for foundations. The piling work was sublet by the plaintiff to another contractor. The preliminary work therefor was excavation of trenches, within which the piles were to be driven. The building itself was to rest on pile caps at the ground level.

Work on the pile-driving was started about July 5, 1931, and completed September 30, 1931, on which date the pile-driver left the site, the first pile being driven July 9, 1931, and the last September 25, 1931.

The parties to the contract agreed upon a cast-in-place pile. The form for the pile was circular, corrugated horizontally, and driven into the ground with a mandrel inserted into the form. The mandrel had straight sides, did not fit into the corrugations, and after successful driving was removed and replaced by poured concrete.

Such a form of pile proved not to be suitable for conditions as they were discovered to be. Sometimes the forms would be punctured at the outer perimeter of a corrugation due to striking a boulder; in other instances the corrugations would crimp together. In case of damage to the corrugated cylinder or shell it might be difficult to extricate the mandrel after driving; in case of rupture water and sand might filter in, making the concreting difficult or impossible.

Some of the work was accordingly rejected and replacement piles driven. Finally, with the approval of the Archi-

tect, a straight-sided steel shell was substituted for the corrugated shell and the work brought to a conclusion.

This difficulty delayed the driving of the piles and extended the period of performance of the contract as a whole. Another difficulty encountered contributed to the same end.

Article 9 of Section V of the specifications provided that cast-in-place piles should be driven with a "No. 1 drop hammer or an equivalent double-acting steam hammer," to an average penetration of ⅛″ per blow for the last foot.

Neither plaintiff's nor defendant's representatives knew nor were they able satisfactorily when testifying in this case to define what a "No. 1 drop hammer" was.

The plaintiff used a No. 1 double-acting Vulcan steam hammer. Driving the mandrel and corrugated shells with this hammer, observing the penetration requirements of the specifications, resulted in instances of over-driving and consequent replacements. Attempts were made to rectify the situation by a change in penetration requirements, without success, and as heretofore related, resort was finally had to smooth-sided steel shells.

This difficulty in successfully driving piles postponed the final completion of the contract about two and one-half months.

On September 3, 1931, the Architect requested of plaintiff its schedule of contemplated progress. Three prints of the schedule were submitted September 25, 1931, stating:

> We are preparing now a new progress schedule showing the delay in the pile driving, and are lining up the rest of trades accordingly. We will forward you this new schedule within the next few days.

The new schedule was submitted October 2, 1931, with the statement:

> We are enclosing herewith three prints of our revised progress schedule dated October 1st, showing the two month delay in completing the piling October 1st, with completion date June 1st, 1932.

The progress schedules referred to were received and filed by the Architect.

Extension of time for performance was not otherwise requested by the plaintiff for this delay.

6. *Top-soil, $350.00.*—Loam was required for planting spaces inside the conservatory. This was to be furnished by the Government and placed by the plaintiff as directed by the Architect. The plaintiff claims that the defendant unreasonably delayed furnishing the top-soil, thereby increasing plaintiff's costs incurred through necessary temporary shoring and plank runways for wheelbarrows.

The plaintiff was ready for the top-soil the fore part of May 1932. On or about May 4, 1932, plaintiff's superintendent of construction verbally requested the Architect's construction superintendent to deliver the top-soil, and the top-soil not being delivered, the plaintiff on May 16, 1932, in writing requested of the Architect its delivery at the site. On the 20th following the Architect advised the plaintiff that the matter was under consideration and advice in regard thereto would be forthcoming in the near future.

Specifically the contract provided (Specifications, Section IV, paragraph 14):

> All loam of different kinds as required, for fill of planting spaces inside building and at terrace edge will be furnished by the Government f. o. b. site, outside of building at points directed by this Contractor [meaning the plaintiff] in consultation with the Architect.

The contract did not specify when the top-soil was to be delivered to the plaintiff.

In its correspondence with the Architect the plaintiff represented that delay in receipt of the top-soil was resulting in extra cost, a record of which would be kept and claim made therefor.

Successive requests were made of the Architect for the top-soil.

The top-soil began to arrive September 29, 1932. After a substantial period of failure to deliver had elapsed the Architect's construction superintendent represented that delivery of top-soil was being withheld because of the danger of broken glass from glazing operations falling into the top-soil, thus creating a future hazard to gardeners who would work the top-soil with their bare hands.

It was possible to cover the top-soil in such manner as to catch falling glass. At what expense effectively to do so

the record does not disclose. The more practical way of preventing shattered glass from mingling with the top-soil was to defer placing of the top-soil until the glazing above had been completed.

Some grading and back-filling, and the placing of tufa stone along borders and laying of flagstone had to be postponed, and certain temporary shoring was necessary awaiting the deposition of top-soil.

Because of the time taken to deliver the top-soil the temporary shoring referred to was installed, and the expense thereof to plaintiff was $350.00, which plaintiff has not been reimbursed.

As a matter of fact top-soil was delivered and placed before the glazing was completed and some splinters of shattered glass got into the top-soil and had to be removed.

Paragraph 4 of Section IV of the specifications provided:

> *Shoring.*—This Contractor shall do all shoring, sheet piling and temporary timber work necessary to retain banks and protect all excavation under this contract, and shall remove such shoring, sheet piling or temporary timber work at time of back filling in such a manner as to cause no damage to surroundings.

7. *Reinforcing dome, $1,543.00.*—The conservatory included a dome over the palm house. The framework of the dome was constructed in accordance with the plans and specifications. The Government engineers were not satisfied with its strength. On May 31, 1932, the plaintiff company notified the Architect that they expected to hang the heating coils in the upper part of the dome within the next few days, at elevation 81′6″. June 1, 1932, the Architect ordered work on the dome above elevation 56′ stopped until further notice. The Architect undertook studies as to advisable reinforcement of the dome and secured the services of the U. S. Bureau of Standards in making tests. While these studies and tests were being made the plaintiff notified the Architect that additional time for completion of the contract would be necessary and that resulting increase of overhead costs was claimed.

On July 7, 1932, the Architect asked plaintiff for a proposal for the furnishing and installation of additional

bracing in the dome which had been decided upon and for which blueprints were furnished.

The plaintiff secured a quotation from the subcontractor, Wheeling Structural Steel Co. of $3,850.00, July 12, 1932, and, adding a customary ten per cent for overhead and ten per cent on the resulting aggregate for profit, proposed to the Architect to furnish the bracing and install the same for $4,658.00, with an additional 45 days for completion. The Architect refused to accept the proposal and the plaintiff refused to proffer a reduction.

August 9, 1932, in a separate order, the Architect increased the contract time by 45 days to cover the extra work of installing additional bracing in the palm house dome.

On September 10, 1932, the Architect authorized resumption of work stopped by the order of June 1, 1932.

The additional work was performed by the plaintiff under protest, and the bracing was finished October 14, 1932. Thereafter the Architect, February 1, 1933, called for an itemization of the proposal and stated that it would have to be "passed upon" by the General Accounting Office before a change order might issue.

The Architect issued the change order April 24, 1933, and set the price at $3,115, purporting to be "pursuant to the provisions of Article 3 of the contract and to a decision of the Comptroller General of the United States dated April 20, 1932 (A-42340)."

The plaintiff refused to accept the change order. The difference of $1,543.00 between the amounts of the change order, $3,115.00, and of the proposal, $4,658.00, has never been paid the plaintiff.

The amount of the proposal, $4,658.00, represents the actual cost to plaintiff of the work plus overhead and profit.

The bracing required the use of temporary scaffolding and the drilling of some 400 holes in the field and involved more than an increase in amount of structural aluminum.

The contract provided:

> Should there be additions to or deductions from the work as described by the contract documents, the increases in the contract price for additional work and

> decreases in the contract price for work omitted shall be based upon the schedule of unit prices submitted in bid of contractor hereto attached.

The bid so attached showed a price of $2,000 per ton for structural aluminum in excess of that required under the contract.

The allowance made by the Architect was pursuant to the decision of the Comptroller General and was calculated as 3,015 pounds of aluminum at $2,000 per ton, plus $100 to cover "excess cost due to performance of the work after the other work had been completed."

8. *Experimental work $397.56.*—In connection with materials entering into architectural metal work and finish hardware paragraph 6 of Section XVII of the specifications provided:

> Tests when required by the Architect shall be made by and at the expense of the Government.

Lord & Burnham Company of Irvington, New York, held the subcontract with plaintiff for architectural aluminum and for glazing, with the installation thereof. As such subcontractors Lord & Burnham Co. performed certain experimental work at the instance and request of the supervising architects. The project was unique in greenhouse construction and the Government officials had not fully informed themselves as to glazing and the use of aluminum therewith.

Accordingly, Lord & Burnham Co. and the supervising architects cooperated with each other in working out untried details, and Lord & Burnham Co. conducted experiments to that end.

On July 28, 1931, the supervising architects at Chicago transmitted the following letter to Lord & Burnham Co., under the subject matter of "Glazing Bar":

> We send you herewith enclosed two prints of our drawing No. 201A, which, ultimately, will become a part of drawing No. 201, indicating at twice full size the profile we would prefer that you use in making the experimental die No. 1, for glazing bars.
>
> We are suggesting to Mr. Lynn that he secure a proposal on the use of the flat glazing method with heavier

glass, in lengths of 5 and 6 ft., and bars at the end joints of glass in accordance with our discussion with you here.

The enclosed drawing indicates, for your information, the profile and method of use of the bar which would occur at end joints between the lengths of glass. These bars would occur always above purlins, would not need to have fastening to the purlins and would be cut in short lengths with square ends fitting neatly between the glazing bars. The section is that which we had worked out and discussed with you while you were here.

With reference to the glazing bar, we believe that a square corner between glass supporting ribs and stem of bar, or a corner only slightly rounded, to make forming of the die and extrusion easy and to provide a slight degree of clearance, is desirable. The corners should be such as to bring the bottom surface of glass supporting rib close to the turned-in lugs of clips used to fasten bars to purlins, because these lugs brace the bolt connecting the bar and clips.

For study and experimental purposes, we have indicated both flat and lapped glazing methods until this matter shall have been settled. The rounded lug occurring on stem of bar about at upper surface of glass would probably assist in keeping bedding material in its proper position for flat glazing but would not be so necessary in connection with the use of mastic material for bedding of glass in lapped glazing.

We have made the horizontal width of groove in the head of bar, for holding spring cap, wider, but believe that its depth should not be reduced as indicated upon your drawing from that which we had previously indicated, and now indicate upon drawing No. 201A.

We believe that the slot on the top of bar to receive spring cap should be made sufficiently wide to receive 18-gauge material as you have indicated, although it is possible that experimentation may indicate that a thinner, say 20, or even 22-gauge, material may be better.

It does not seem necessary to make the corrugations in the stem of bar above the glazing lugs. It had been our intention to curve the lower edges of spring cap downwards slightly to retain bedding materials, especially if some fabric reinforced material were used as might well be the case with flat glazing. It seems that the form of curvature of the lower portions of spring cap should be such as to cause the least deviation of the outer edge from a line parallel with bar center if lapped glazing is used, and to this end we suggest your further consideration of curving this portion of the spring cap

approximately as we have indicated it, rather than making a sharp bend as indicated upon your sketch for the cap.

Again, on August 4, 1931, another letter was transmitted as follows:

> In answer to the inquiry in your first paragraph, we indicated the extruded came on our drawing #201–A solely for your information, and to have the detail of its section in your hands only in the event that the flat glazing method including the use of a came shall become a part of the contract through adjustments which are yet to be made.
>
> It is probable that the lower edge of the spring cap when used with the lapped glazing will vary between the low point and the high point somewhat more than indicated upon our drawing #201–A, and less than indicated upon sketch enclosed in your letter. Its projection will depend principally upon the form of its curvature. It is not a matter of great importance and can be adjusted, if need be, during our experimentation.
>
> We would suggest that in order to be prepared, extruded bars for experimental purposes be made in lengths sufficient to take a full 6 ft. long, 3⁄16″ thick, glass with space for a came joint, and that there be three bars, with glazing on one side of the center bar of lapped 1⁄8″ thick, 24″ glass, and upon the other side with flat glazing of the 3⁄16″ thick Mississippi Glass Company's glass, using the three types of finish: "Factrolite", which we may wish to use for vertical surfaces; "Ribbed", which probably will be best suited for sloped surfaces, and "Pentecor" which will appear to have the best transmission of light property but which is probably too coarsely ribbed to hold condensation on a 30° roof.

By wire the supervising architects made the following request of Lord & Burnham Co. October 13, 1931:

> Mailed today via Twentieth Century sample bar upper part and two samples of cap one three quarter other one half hard both twenty two gauge four S aluminum stop. desire your reaction after experimenting as to this bar and cap or modified as you think it might be improved stop we think slightly lighter gauge may be better stop assume we shall use lap glazing stop desire to reach decision after comparing this type glazing bar and cap with other method recommended by you.

As a result of experimental work Lord & Burnham Co. perfected a practical glazing bar and cap, which was accepted by the defendant. The bar and cap, so adopted, was not the bar and cap originally called for by the contract plans. Lord & Burnham Co. did this work at a cost of $328.57. With overhead and profit added thereto for the plaintiff this amount is increased to $397.56.

The claim for $397.56 was presented by the plaintiff to the Architect May 12, 1932, in detail. It has not been paid.

9. *Extra belt course, $827.20.*—The original drawings did not indicate a belt course between Spaces 102 and 108, elevation 55′8″. After the contract had been entered into and the work undertaken, the supervising architects issued a supplemental drawing September 22, 1931, showing a belt course at elevation of 55′8″ between Spaces 102 and 108, which was approved by the Architect. In order to conform to the plans Lord & Burnham Co. installed the extra belt course, at a cost of $683.64. With overhead and profit added thereto, this would be increased to $827.20. A claim for this, $827.20, was presented by the plaintiff to the Architect May 12, 1932. It has not been paid.

10. *Rafter caps, $8,202.34.*—Suitable provision had not been made for the hanging of scaffolding on the conservatory. Means of attachment thereto to the trusses in the roof were necessary, especially for the purpose of replacing broken glass. This omission Lord & Burnham Co. called to the attention of the supervising architects. The supervising architects acknowledged the necessity and drawings for a "rafter cap" were submitted and after many revisions were finally approved by the Architect. The rafter caps were set over the trusses and held brackets to which scaffolding might be attached. The rafter caps and the glazing bars had to be related to each other and much time and labor was spent in fitting one unit to the other. There was also involved a "spring cap" for holding the glass in place, which proved not to be practicable, another cap being substituted. (See Finding No. 8.)

The installation of the rafter cap added to the work to be done and the material to be furnished by Lord & Burnham

Co. The additional expense thereto was $6,778.80. Adding thereto overhead and profit for the plaintiff brings the amount to $8,202.34.

For this amount the plaintiff presented claim to the Architect May 12, 1932. It has not been paid.

11. *Returned gutter ends, $769.44.*—The original contract drawings showed the method of terminating the gutters of so-called "lean-to" and corner houses against the roof of the adjacent border houses. The supervising architects, with the approval of the Architect, changed these drawings so as to show the ends of the gutters mitered and returned to the vertical surfaces of the lean-tos and corner houses. This necessitated additional expenditures of labor and material by Lord & Burnham Co., at a cost thereto of $635.90. With the addition of overhead and profit for the plaintiff this amounts to $769.44. On May 12, 1932, the plaintiff presented to the Architect a claim for this item, which was, however, in excess of $769.44. The claim made herein is confined to $769.44, and has not been paid.

12. *Glazing bar, $610.58.*—The original glazing bar required by the contract was abandoned as impractical. The glazing bar was of aluminum and formed by the extrusion process. Die drawings were prepared by Lord & Burnham Co. for a practical bar, in consultation with the supervising architects. These die drawings were ultimately submitted to and approved by the Architect. They required the use of more aluminum than the original contract bar, and the manufacture of two additional dies.

For this additional expense the plaintiff May 12, 1932, presented a claim to the Architect for $504.62, itemized, plus overhead and profit, a total of $610.58. It has not been paid.

13. *Extrusion of gutter in two parts, $3,439.02.*—The original contract die for a gutter contemplated one extrusion only. It was found physically impossible to extrude the gutter in one piece, due to its large size. In consultation therefore between Lord & Burnham Co. and the supervising architects two dies were substituted for the original single die, and the drawings therefor were approved by the Architect. The new design required the use of more aluminum, and welding, bolting and assembling not otherwise necessary.

The cost to the plaintiff of such welding, bolting and assembling was $2,224.78. Adding overhead and profit makes the amount $2,691.97.

The cost to the plaintiff of the additional aluminum was $617.40. Adding thereto overhead and profit raises the amount to $747.05.

The entire sum is $3,439.02. Claim therefor was presented by plaintiff to the Architect May 12, 1932, with detail. It has not been paid.

14. *Top members of belt course; small gutter for border houses, $446.69.*—It was also found impossible to extrude aluminum in accordance with the drawings for top members of the belt course and a smaller gutter for the border houses. In consequence Lord & Burnham Co. revised the drawings therefor to meet this situation, and the revision was approved by the Architect. The revision necessitated the use of more aluminum, the cost of the excess to the plaintiff being $369.18, which is increased to $446.69 if overhead and profit be added.

A claim for this amount was submitted by the plaintiff to the Architect May 12, 1932, with detail. It has not been paid.

15. Claims for the items enumerated above beginning with Finding No. 8, in connection with work performed by Lord & Burnham Co., were submitted by the plaintiff to the Architect, as heretofore stated May 12, 1932, and are summarized as follows:

8. Experimental work	$397.56
9. Extra belt course	827.20
10. Rafter caps	8,202.34
11. Returned gutter ends	769.44
12. Glazing bar	610.58
13. Extrusion of gutter in two parts	3,439.02
14. Top members of belt course; small gutter for border houses	446.69
Total	14,692.83

No formal orders for a change were issued in connection with the Lord & Burnham Co. items. The changes were made pursuant to drawings, correspondence and consulta-

tions, and all of them finally received the approval of the Architect.

The Architect submitted the plaintiff's claim December 26, 1933, to the Comptroller General of the United States. In the submission he stated that "the contractor did not notify this office within 10 days as required by the contract." He did not recommend disallowance of the claim on that ground or on the ground that formal change orders had not been issued. As to the claim in general he concluded:

> During the construction of the building and after its completion there has been opportunity to observe the changes for which the architects [meaning the supervising architects] recommend that the contractor be allowed $1,755.93, and this office is of the opinion that the changes were such an improvement to the construction as to justify the additional cost. It is accordingly recommended that the contractor be allowed the sum of $1,755.93 for this item.

The Comptroller General approved this recommendation, advised the plaintiff of the recommendation, stated that it included overhead and profit, and allowed the sum of $1,755.93 in General Accounting Office settlement of March 21, 1934, on the ground that the contracting officer had found that the sum of $1,755.93 represented a fair and equitable adjustment of the amount due the contractor on account of the changes made and that there was no legal basis for the allowance of any more.

The Architect did not furnish the plaintiff with a copy of his findings in the matter. The plaintiff has not been apprised at any time as to how the sum of $1,755.93 was arrived at, or what specific items it was intended to cover. There is no evidence of record as to how the sum was calculated.

16. *Delays in general.*—The plaintiff claims that it was unreasonably delayed by the defendant in the performance of its contract.

The revised progress schedule, referred to in Finding No. 5 hereinabove, showed inception of excavation and piling as in the original schedule, and postponement, generally, of the commencement of other work by about two months, an exception being loam fill which both schedules set to

commence the middle of December, 1931. The loam was to be furnished by the Government.

The revised schedule indicated completion by the end of May, 1932. The original schedule indicated completion March 12, 1932, a difference of about two and one-half months.

The project was completed and accepted January 13, 1933, a delay of 307 calendar days, based on the original contract completion date of March 12, 1932. Based on a scheduled completion date of May 31, 1932, the delay would amount to 227 calendar days.

Article No. 9 of the contract provided that if the contractor refused or failed to prosecute the work, or any separable part thereof, with such diligence as to insure its completion within the agreed time, or failed to complete the work within the agreed time, the contractor, if the Government so elected, should in lieu of actual damages for delay, pay to the Government liquidated damages at the rate of $175 per day for each calendar day of delay.

On December 26, 1933, the Architect submitted to the Comptroller General of the United States his recommendations in detail on adjustment of all contract matters. With respect to the delays, which he enumerated, he concluded:

> In view of the delays enumerated above and the changes made during the construction, this office assumes the responsibility for all delay in completion. The Government suffered no loss or inconvenience on account of the delay. It is accordingly recommended that all liquidated damages accruing under the contract be waived.

No liquidated damages for delay have been charged against or collected from the plaintiff.

Various specific extensions of time for performance were given to the plaintiff to cover changes ordered under Articles Nos. 3, 4, or 5 of the contract.

The change orders that included extensions of time by the Architect were as follows:

Change Order No. 2, March 11, 1932.

Change in construction of terrace—adjustment of contract price to be determined later—contract time increased by 60 calendar days.

Change Order No. 12, July 9, 1932 (in part).
Expansion joints in pipes, addition to contract price $788.92—contract time increased by 30 calendar days.
Change Order No. 16, August 9, 1932.
Contract time increased by 45 calendar days to cover extra work in bracing of palm house.
Change Order No. 19, September 24, 1932.
Contract time increased by 30 calendar days to cover extra work in installing iron ladders and catwalks.
Change Order No. 21, October 22, 1932.
Substitution of wire glass for ribbed glass—addition to contract price $289.43—contract time extended by 30 calendar days.
Change Order No. 24, November 22, 1932.
Platforms for ladders—$185.13 added to contract price—contract time extended by 15 calendar days.
Change Order No. 25, November 29, 1932.
Sidelight anchorage at doorway—addition to contract price $163.35—increase of 20 calendar days allowed therefor in contract time.

The total of these increases in contract time amounted to 230 calendar days. This changed the contract completion date from March 12, 1932, to October 28, 1932. As the contract was completed and the work accepted January 13, 1933, the number of calendar days not covered by any particular extension of time was 77 days.

Action on other changes which might involve extensions of time for performance the Architect deferred until final settlement, and the record does not disclose, nor was the plaintiff informed, as to what other particular matters the Architects decided entitled the plaintiff to corresponding extensions of time.

On the basis of a scheduled completion date of May 31, 1932, the specific extensions of time granted, amounting to 230 calendar days, exceed the delay of 227 calendar days.

In setting the price on changes the Architect made no allowance for damages for delay. In general, the price set was based on cost plus overhead and profit, or the agreed unit price.

17. *Delays in consideration of drawings.*—The plaintiff claims that it was unreasonably delayed in performance because of procrastination on the part of defendant's officers in the consideration of shop drawings.

Shop drawings are detailed drawings prepared by the contractor or subcontractor, from the original contract drawings. The original contract drawings do not go into the necessary particularity and refinement. The shop drawings demand a certain originality, and in the instant case they had to receive finally the approval of the Architect.

As to the submission, correction and approval of shop drawings the specifications, paragraph 4 (e) of Section I, provided:

> (e) *Shop and erection drawings*.—The Contractor shall submit to the Architect for approval not less than four copies of all shop drawings called for under the various headings. The drawings shall be complete, giving all the required information and must be checked by the Contractor before being submitted to the Architect. If approved, each copy shall be identified as having received such approval by being stamped or marked thus: "Approved subject to contract requirements" and dated. Two sets will be retained by the Architect and two returned to the General Contractor. If not approved, each copy will be identified by being stamped or marked thus: "This shop drawing shall be corrected as noted," and dated. After being stamped and marked for correction, with the necessary changes having been indicated thereon, two copies of each drawing will be returned to the Contractor for the necessary corrections. After the corrections have been made, the Contractor shall submit four copies of corrected drawings to the Architect for approval and distribution as above provided. The approval shall not be construed as a complete check but only will indicate that the general method of construction and detailing is satisfactory. Approval of drawings will not relieve the Contractor of the responsibility for any error which may exist, as the Contractor shall be responsible for the dimensions and designs of adequate connections, details and satisfactory construction of all work.

In the beginning the subcontractors, who prepared the shop drawings, sent those drawings to the plaintiff, the plaintiff sent them to the Architect, and the Architect sent them to the supervising architects. They were returned by the route they had come in.

Structural shop drawings and architectural shop drawings had to be coordinated.

The problem arose as to when and by whom the drawings should be coordinated. The structural drawings were generally the primary drawings and the architectural drawings had to fit them. Corrections, changes, revisions, were mainly the work of the supervising architects. If coordination were attempted by and between the subcontractors themselves, before submission to the supervising architects, the time taken to coordinate might be wasted, and coordination would have to be accomplished again to accommodate a single revision.

The contract provided for no satisfactory routine for the handling of shop drawings. It was impractical for one subcontractor to submit his shop drawing to another subcontractor for coordination when either one or both had not been corrected or approved by the Architect or supervising architects, and approval was not possible without coordination. Many of the changes and corrections, aside from coordination, were substantial. Changes made by the Architect or supervising architects on the drawings were not always covered by a formal change order. There were two classes of corrections, those made where the shop drawing did not conform to the original contract drawing, and those made where the supervising architects or the Architect was not satisfied with the original contract drawing.

By special arrangement between the parties, in order to save time, the routine was changed and Lord & Burnham Co., and Wheeling Structural Steel Co., subcontractors, submitted their shop drawings directly to the supervising architects in Chicago, by-passing plaintiff and the Architect. Only drawings ready for approval went back to the Architect.

The responsibility for coordination was originally upon the plaintiff as general contractor. This was not practicable, and the supervising architects assumed the function of coordination, to that extent relieving the plaintiff. It was necessary at times to hold one batch of drawings until other drawings came in with which they had to be coordinated. This method of operating was of assistance to all parties in the prosecution of the work.

The Architect at no time made any specific allowance of additional time to the plaintiff for performance on account of time taken to handle, examine, correct, or approve drawings.

There is no satisfactory proof that defendant's officers did not handle, examine, correct or approve drawings with due diligence, or that whatever delay occurred was not mutual. As heretofore indicated, time was in fact saved by having the supervising architects coordinate the drawings instead of plaintiff doing that work.

18. *Delay in decision on fit of bolts.*—Paragraph 6 (a) of Section XIV of the specifications, relating to structural steel work provided that:

> Wherever bolts are used in place of rivets which transmit shear, such bolts must have a driving fit.

For structural aluminum paragraph 7 (b) of the same section provided that details of construction for structural aluminum should be as specified for structural steel, with exceptions not here relevant. Paragraph 11 (f) of the same section provided:

> (f) *Bolting structural aluminum.*—Field connections of aluminum between aluminum members and of aluminum connections to steel shall be made with close fitting aluminum bolts turned up tight and with threads checked; if necessary to obtain close fit holes shall be matched by reaming and oversized bolts used. No field riveting of aluminum is required.

The plaintiff interpreted the specifications as providing for tight-fitting aluminum bolts only when they were "in shear," that is to say in such position that the strain against them had a tendency to cut them, and that in other places loose-fitting bolts were to be used to allow for the play incident to expansion and contraction.

Shop drawings were approved by the Architect October 8, 1931, showing loose-fitting bolts in places not subject to shearing action. When the bolts arrived on the job they were rejected by the Government inspector on the ground that they should be tight-fitting bolts. Tight-fitting bolts were more expensive than loose-fitting.

The plaintiff and its interested subcontractors, together with the supervising architects, were unanimously of the opinion that aluminum bolts not in shear were to be loose-fitting.

January 30, 1932, the Architect ruled that all aluminum bolts should be tight-fitting. This did not end the controversy. After several conferences the Architect on March 7, 1932, changed his decision and permitted the plaintiff to use loose-fitting bolts where they had been so indicated on the shop drawings, except that they should be tight-fitting above the "spring line" of the dome. The spring line was the line where the wall of the dome took its departure in an arch from the vertical.

The loose-fitting bolts were rejected by the inspector December 20, 1931, and the question was not finally settled by the Architect until March 7, 1932, an elapsed period of 78 calendar days.

The bolts were a necessary feature of the structural part of the conservatory, and the time taken to arrive at a decision was unreasonable and delayed completion of the contract. The extent of delayed completion is indeterminable.

19. *Delay in reinforcing dome.*—The dome was required to be and was reinforced in the manner and under the circumstances described in Finding No. 7. The plaintiff claims that the delay occasioned by the stop order was unreasonable and prays damages therefor. The extension of time allowed by the Architect on account of the extra work involved was 45 days, as recited in Findings Nos. 7 and 16, and the extra work delayed completion of the contract. How much that delay turned out to be cannot be determined.

20. *Delay in decision on slip joints.*—Around the entire structure was a so-called belt course that served as a gutter. The original plan did not provide expansion joints therein, but required the joints to be welded. The belt course was of aluminum, which expands at about twice the rate of steel, and expansion joints were necessary. They are sometimes referred to in the record as slip joints.

In addition to serving as gutters the belt courses were structural, supporting the glazing bars to which the glass

was attached, and served as the starting point for architectural aluminum.

In response to a verbal request from the Architect's office April 12, 1932, the plaintiff furnished an estimate April 13, 1932, of the cost of a change from welded joints to slip joints. At that time practically all of the work affected by the change had been completed in the shop and some of it had been packed for shipping to the job April 20, 1932. At a conference in the Architect's office June 10, 1932, the plaintiff was given a verbal order to proceed under the estimate and so proceeded. Formal order for the change was issued and received by the plaintiff June 23, 1932, without increase of contract time.

The plaintiff's estimate of April 13, 1932, was $586.85, including overhead and profit, and an extension of contract time by 30 days. In response to urgent messages from the plaintiff company the Architect advised them May 12, 1932, that the change estimate had been "recommended for approval" and the change order should be in their hands within the next few days.

June 28, 1932, the plaintiff requested of the Architect an extension of contract time by 58 days, to cover the period April 13, 1932, to June 10, 1932.

By reason of the time it took the Architect to act upon plaintiff's estimate the plaintiff was delayed in completion of the contract.

The plaintiff protested against the delay, during the time that the delay was running, and notified the Architect that it would expect to be reimbursed resulting excess of overhead costs.

The extent of the delay in completion of the contract is indeterminable.

21. *Delay in deciding upon glazing bar, spring cap, and purlin.*—The glass enclosing the conservatory was to be retained in place by aluminum glazing bars. This feature was novel to some extent and the officials of neither party had had any great experience in the use of aluminum along those lines. The ordinary frame work in greenhouses for holding glass was wood, which offered the necessary resilience to expansion and contraction due to temperature changes.

The structural member that supported the glazing bar was the purlin.

Associated with the glazing bar was the spring cap or clip which was sprung over the bulbous part of the glazing bar and held the glass in place.

All these members were of aluminum.

The spring cap originally designed and called for by the plans, was, in connection with the planned glazing bar, unsatisfactory in that (1) when pressed over the bulb of the glazing bar it exceeded its elasticity, because made of aluminum, and would not return sufficiently to its original form to secure the glass; (2) it could not successfully be made to fit the curved portions of the roof; and (3) it would not support the planks of scaffolding without transferring the load to the glass and breaking the glass. Scaffolding for the purpose of reglazing would in course of time have been necessary.

Lord & Burnham Co. informed the supervising architects of this situation, and of the fact that they had an arrangement of their own design that they felt would fulfill requirements. October 12, 1931, the supervising architects wired Lord & Burnham Co.:

> Attention Mr. Wright advise you make and submit to us shop drawing of glazing bar and cap as would be recommended by you to facilitate early decision.

This followed conference and correspondence upon the subject relating to the form of glazing bar proposed by the supervising architects. Involved in the matter was the question whether glazing should be flat, in which event cames would be used, or should be overlapped, in shingle fashion, a question which the Architect had not then determined. Lapped glazing was eventually adopted.

The correspondence quoted in Finding No. 8 herein states the situation underlying the delay.

A part of the structure was the purlin. A purlin is a structural member that extends from one truss to another or one beam to another, to support the glazing bar and the glass.

The original plans did not contemplate fastening the glazing bar to the purlin, but with the type of glazing bar and spring cap finally adopted it was necessary to determine on some means of attaching glazing bar to purlin. This was done by the use of bolts with heads in the form of hooks to grasp the glazing bar. This required drilling holes in the purlins for reception of the bolts, drilling not originally contemplated. The drilling was done in the field. For such work the plaintiff submitted a proposal to the Architect November 17, 1931, in the sum $605 including overhead and profit. The plaintiff complained of delay in passing upon the proposal and on April 19, 1932, asked for an extension of contract time. May 18, 1932, the Architect notified the plaintiff that a change order would shortly be issued, but that it provided for no extension of time. The Architect suggested the furnishing of details for the basis of an allowance of extra time. The change order was issued May 18, 1932, for $605. Thereupon the plaintiff claimed an allowance of 30 days and May 28, 1932, the Architect advised the plaintiff that it was now recognized that plaintiff had been delayed for a period of 30 calendar days in connection with this change and that at the time of final settlement consideration would be given to the waiver of liquidated damages over a corresponding period.

It is impossible to make a finding as to the extent of delay in completion of the contract occasioned by the facts recited in this finding. By reason of the facts recited plaintiff was delayed in completing the contract.

22. *Delay in decision on change in glass.*—The specifications provided that "B" quality, double strength ground window glass must be used for glazing all roofs of greenhouses and sloped, curved, and vertical surfaces of exterior walls of greenhouses down to about elevation 30′2″, and other specified roofs.

August 1, 1931, the Architect by letter proposed to the plaintiff changing the ground glass to 3/16″ thick, flat drawn, annealed glass ribbed on its lower surface with fine ribs, substituting flat glazing for shingled glazing, stating that it was understood a saving in cost would be effected, and requesting an estimate for the proposed changes.

For these changes the plaintiff submitted an estimate August 20, 1931, in the sum of $17,430 additional to the contract price. The flat glazing method, otherwise known as butted glazing, involved the use of aluminum cames, into which the lights were butted, and putty or glazing compound.

The Architect rejected the proposal September 11, 1931, considering the cost excessive, stating that the desirability of the change did not justify the increased expenditure.

The plaintiff altered the specifications of its proposal somewhat, reducing the proposal to $10,146 October 7, 1931.

The second proposition was rejected November 19, 1931, with the statement that it was not desired to make the proposed change.

December 18, 1931, the Architect advised the plaintiff that he understood the subcontractors, Lord & Burnham Co., were willing to furnish ribbed glass slightly more than 2/16 ″in thickness, as manufactured by the Mississippi Glass Co., "or equal," in lieu of ground glass, with no increase in contract price. The Architect requested a proposal for this substitution, without change in contract price.

Lord & Burnham Co. refused to make the substitution without additional charge unless the standard 2/16″ glass made by the Mississippi Glass Co. were specified and December 22, 1931, the plaintiff so informed the Architect.

January 30, 1932, the Architect advised the plaintiff that substitution of 3/16″ ribbed glass had been tentatively decided upon, and asked for a proposal at reduced cost with proper credit to the Government.

The plaintiff replied to this February 1, 1932, stating that there would be no change in price for 2/16″ ribbed glass, but that there would be an extra if 3/16″ glass were substituted, urged prompt decision, and said: "the time has now come when any further delay will embarrass us in the completion of the work."

Again on February 3, 1932, the plaintiff communicated by letter with the Architect, in which it was pointed out that fittings for the reception of the glass were in an advanced state of completion, that those fittings would not accommodate 3/16″ glass, and that 3/16″ glass could not be furnished

without an increase in contract price. The letter concluded with a request for more time for contract completion, unless an immediate decision was given.

On February 10, 1932, the Architect authorized the plaintiff to substitute 3/16″ ribbed glass for the B quality ground glass, but reserved the question of price, claiming a credit and asking for evidence of why credit should not be given.

The glass was finally installed in shingle fashion, and the plan of flat glazing, with the glass butted in cames, was abandoned.

April 5, 1932, the Architect informed plaintiff that there would be no change in the contract price, and May 10, 1932, advised the plaintiff:

> In view of the period of time consumed between December 22, 1931 and February 10, 1932, in the consideration of this change, a delay of thirty calendar days as claimed by your letter of April 7th is hereby recognized and consideration will be given at time of final settlement to a corresponding extension of the contract time.

The time taken to decide upon the type of glass to be used deferred completion of the contract. The extent of such delay is not possible of determination.

23. *Delay in deciding upon change in glass under monitors.*—The glass under the monitors was to be of B quality ground glass. Thereafter it was changed, February 10, 1932, to ribbed glass. See in this connection Finding No. 22.

This area was in such position that snow or ice was likely at times to slide down upon it, breaking the glass. Defendant's engineers, in view of this likelihood, took the matter up with plaintiff's superintendent on the job, asking as to the substitution of wire glass, that is glass with wire mesh embedded therein. On the same day as this request the plaintiff, May 14, 1932, gave an estimate of $3,292.74 for the change, with a delay of 30 to 60 days, suggesting as an alternative that galvanized steel wire mesh snow guards might be used, obviating delay. Change to wire glass necessitated increase in thickness of the glass from 3/16″ to 4/16″, or 1/8″ to 1/4″, as wire glass could not be secured thinner than 4/16 inches.

Having no reply to its estimate the plaintiff ordered $\frac{3}{16}''$ ribbed glass for the entire job and so notified the Architect May 25, 1932.

There followed considerable correspondence between the parties on the subject, the plaintiff furnishing requested estimates, urging expedition, and asking for extension of contract time to cover the delay in decision.

On July 19, 1932, the Architect verbally gave plaintiff orders to proceed with the substitution of wire glass for ribbed glass in the places that had been designated.

On August 4, 1932, the Architect issued his Change Order No. 15 substituting wire glass for ribbed glass in designated locations, for the additional sum of $2,551.30. No extension of the contract time was specified. This change order followed a proposal by the plaintiff in the sum of $2,551.29, coupled with an extension of contract time by 45 days.

Further changes were made, however, by the Architect, and it was not until about the middle of October, 1932, that plaintiff was in receipt of all details relating to the change.

On October 22, 1932, the Architect issued Change Order No. 21 for substitution of wire glass for ribbed glass in other designated places, which concluded: "To allow for delivery and installation of wire glass, the contract time is hereby increased for thirty (30) calendar days." See Finding No. 16.

The substitution of wire glass for ribbed glass under the monitors was a change upon a change.

The contract was delayed in completion because of the delay in decision on change in glass under the monitors. The extent of the delay cannot be ascertained.

24. *Delay in deciding upon terrace.*—The specifications provided for exterior concrete terraces laid directly upon the ground, without other support.

August 6, 1931, the Architect requested of plaintiff a proposal covering a proposed change of terrace in construction to a concrete beam and girder slab supported on pile foundations, enclosing blueprints illustrating the new construction.

Before this proposed change was put through the Architect, September 30, 1931, requested of the plaintiff proposal

for a further revision, using stone laid on a bed of sand, in lieu of concrete on cinder fill, enclosing blueprints.

The proposed revision did not call for piling. The plaintiff furnished an estimate November 6, 1931 of $12,879.00 for the terrace as redesigned, omitting piling, using Berea stone (paving) and recommending that a concrete footing be placed under the terrace wall, extending through the fill (sand bed) to solid ground.

This revision required in turn a revision of the drawings for granite composing the walls.

January 21, 1932, the plaintiff submitted to the Architect a like estimate, for the same amount, except that the stone paving was to be of Crab Orchard stone.

February 4, 1932, the plaintiff submitted an estimate reduced by $800 in the event Crab Orchard stone paving was used.

March 5, 1932, another estimate was submitted, revised in some particulars, and providing for a footing to the wall around the terrace. For Berea stone paving this estimate was $12,199.00; for Crab Orchard stone $11,399.00.

March 12, 1932, another estimate was submitted for the same work, in the alternatives of $12,651.00 and $11,851.00, with extension of contract time by 60 days under either alternative.

March 14, 1932, the plaintiff submitted another estimate for the same work, with like condition as to time, the alternatives being $11,761.00 for Berea stone paving, $10,961.00 for Crab Orchard stone paving.

March 15, 1932, the plaintiff submitted its last estimate, for the same work and time condition, $12,851.00 for Berea stone, $12,051 for Crab Orchard stone paving.

The terrace had a granite curb around the outside edge.

The various estimates were submitted at the Architect's request each involving some change from the previous one.

The Architect gave a verbal order to proceed with the work on or about March 11, 1932.

The indecision with respect to the terrace delayed the granite work thereon.

On the day that the Architect ordered the work to proceed, March 11, 1932, he issued his Change Order No. 2 for the change heretofore described, the adjustment in contract price to be determined later, concluding:

> In view of the fact that the completion date for this contract is March 12, 1932, and of the additional work required by this change, the contract time is hereby increased sixty (60) calendar days.

April 14, 1932, the Architect issued to the plaintiff Change Order No. 6, increasing the contract price by $10,327.98 for this change. This included overhead and profit for the plaintiff company.

Construction of the terrace was one of the last items of the job.

Contract completion was delayed by the circumstances described in this finding, to what extent cannot be determined.

25. *Delay in approval of electrical materials.*—November 7, 1931, the plaintiff submitted to the Architect the name of a proposed subcontractor for the electrical work. Another proposed subcontractor had been submitted June 25, 1931, for approval, but the plaintiff had canceled the subcontract with him for failure to perform. Under the original progress schedule electrical work was to commence the middle of August, 1931, and be concluded at the end of the contract period. The revised progress schedule set the commencement of the electrical work the first of November, 1931, ending with the end of the entire contract work.

The plaintiff submitted to the Architect November 24, 1931, a complete list of electrical equipment to be furnished by the electrical subcontractor. The list was approved February 4, 1932. The plaintiff could not order all of the equipment until after the approval by the Architect.

The delay in approval was due to an oversight in the office of the Architect. Approval of the electrical equipment list had been informally given, however, before the formal approval of February 4, 1932, and some of the electrical work had been installed before that date.

The electrical work in the building was completed January 10, 1933.

Final completion of the contract was not delayed by failure promptly to approve the electrical material by formal action.

26. *Delay in decision on sash-operating motors.*—The sash-operating motors opened and closed the movable sash in the greenhouse roof. They were made to order.

December 14, 1931, the Architect notified the plaintiff that the question of changing their voltage was being considered. This had the effect of stopping work on the motors.

Determination as to voltage was given January 30, 1932. Details of operating characteristics, based on the determined voltage, were furnished the Architect on or about March 18, 1932, the motors were approved by the Architect March 23, 1932, and the plaintiff on that date was so notified. Work on the motors was then resumed.

Final completion of the contract was not delayed by the time taken to modify the sash-operating motors.

27. *Delay in decision on tell-tale system.*—The tell-tale system is an electric circuit with a dial and a graph to show how far the sash is open at the time of inspection.

January 7, 1932, the plaintiff submitted its first shop drawings showing the tell-tale system. It was of an intricate nature. These were approved February 25, 1932. The manufacturer of the tell-tale system was the General Electric Co. The plaintiff notified the Architect that 13 weeks were required to manufacture this tell-tale equipment after approval of the shop drawings.

March 5, 1932, the plaintiff requested an extension of time on account of delay over decisions on the tell-tale system. March 9, 1932, the Architect informed plaintiff action on the request for additional time would be held in abeyance.

May 9, 1932, the Architect issued his Change Order No. 8, for omission of a conduit and wire to the tell-tale transmitter and in lieu thereof an empty conduit for a future motor sash operator, at an increased price of $92.92, including overhead and profit. The same change order covered a substitution for an arm and rod mechanism required by the contract to connect the line shaft to the sash operators, at an increase in contract price of $363.00, including overhead and profit.

This change order made no provision for change in contract time.

There is no satisfactory proof of delay, occasioned in the final completion of the contract, by the time taken by defendant's officers, to decide upon the tell-tale system.

28. *Delay in decision on sash-control panel.*—The sash-control panel is the board on which are mounted the instruments that govern the opening and closing of the sash.

Shop drawings for the sash-control panel were submitted January 7, 1932, resubmitted twice, and approved May 2, 1932. The sash-control panel had to be specially manufactured.

The delay in the shop drawings was due to a change being considered by the Architect to accommodate the panel to six additional circuits for future sash operator motors and 14 additional mountings for switch control units.

Alteration in the plan of the panel delayed completion of an interior bearing wall of the building and masonry adjacent to location of the panel. The panel box was to be corbeled out from the wall, the corbelling bonded into the wall, and until dimensions were available and conduits decided upon a section of the wall, back of the panel, had to be left open and unfinished. About 85 per cent of the conduits in the building terminated at the panel.

The supervising architects requested of plaintiff February 19, 1932, a proposal for the installation of a new lintel beam, involved in the re-arrangement of the panel.

By Change Order No. 12, July 9, 1932, the Architect ordered the furnishing and installation of the lintel beam, for the additional sum of $25.00, in accordance with an estimate submitted June 17, 1932. No extension of time was involved.

On April 21, 1933, the Architect issued his Change Order No. 27, for the furnishing and installation on the sash-control panel of six additional circuits for future sash-operator motors, and 14 additional mountings for switch control units, at the additional sum of $321.86, inclusive of overhead and profit, in accordance with a proposal on the part of the plaintiff May 17, 1932. In the proposal the plaintiff had requested "an extension of our contract time of completion sufficient to

cover the time lost on account of this change." The change order made no provision for extension of time.

There is no satisfactory proof of delay occasioned the plaintiff in completion of the contract, by reason of the matters set forth in this finding.

29. *Delay in approval of changes in sewer connections.*—On or about November 1, 1931, the plaintiff, in checking over the plans for sewer connections, found that they did not agree with requirements of the District of Columbia. Defendant's attention was called to this and plaintiff prepared plans and an estimate for change which would satisfy requirements.

The estimate was furnished November 24, 1931. This estimate was in the sum of $590.29 and was disapproved. A revised estimate was furnished December 11, 1931, in the amount of $456.07, including overhead and profit, exception taken to the price thereof by the Architect January 13, 1932, an explanation or break-down was furnished by the plaintiff January 15, 1932, and verbal approval was given by the Architect February 11, 1932, of the details proposed by the plaintiff.

Formal Change Order No. 4 was issued by the Architect March 23, 1932, in the amount of $456.07, without change of contract time.

The work in question was the manhole in the street in which is the connection to the main sewer.

There is no satisfactory showing that the plaintiff was delayed in completion of the contract due to the recited circumstances surrounding construction of the manhole and attendant matters.

30. The overhead allowed by the Architect on changes was for job conditions, at the site, otherwise known as job overhead, at a uniform rate of 10 per cent on cost, and did not include general office overhead.

Many of the delays were concurrent and it is impossible accurately to assign to any one delay the appropriate portion of the entire delay with which it might fairly and reasonably be charged.

The contracting officer's change orders in which he allowed an extension of contract time do not clearly and satisfactorily

indicate whether the extra time given was solely for the time necessary physically to execute the change, or whether they covered the time that the entire work was retarded due to matters incidental or preliminary to the change, such as negotiations, revisions of drawings, planning, deciding, or simply whether, in view of all the circumstances with respect to the change in contract requirements, the contractor needed that much more time in which to complete the entire project.

But for delays by the defendant, for which it is responsible, the plaintiff could and would have completed its contract by the end of May, 1932. The period thereafter, June 1, 1932, to January 13, 1933, 227 days, represents time consumed due to delay by the defendant for which the plaintiff has received as reimbursement of job overhead on change orders $1,673.64 only.

The extra time allowed by the Architect on change orders was merely an estimate, and the extent of delay in completion was at the time of the change orders, prospective only, except as to any change order issued after termination of contract activities.

The contracting officer has made no apportionment of the entire delay to the participating causes thereof.

31. It is not possible to establish from the evidence the extent of the delay for which the defendant is liable in damages, as for breach of contract. But taking all the proved circumstances into consideration it is concluded, and found as a matter of fact, that the plaintiff has been damaged in the amount of $2,500 by reason of delays by the defendant, not excusable under the terms of the contract.

The Architect consistently held throughout the contract period, and repeatedly so notified the plaintiff, that he had no jurisdiction to award damages for delay.

32. On August 17, 1933, the Architect requested of the plaintiff, in order that final payment might be made, that final voucher, approved by the Architect, be submitted, together with a requisition for any additional amounts claimed to be due, the final voucher to be in turn submitted to the Comptroller General of the United States "for final disposition and settlement."

The plaintiff on September 12, 1933, submitted to the Architect a claim for such additional amounts, including in substance the items sued on herein, and signed under protest the accompanying voucher approved by the Architect. With the voucher the plaintiff furnished the following release:

Release under Contract ACbg–5

Pursuant to provisions of Contract ACbg–5, dated June 9, 1931, by and between the United States (the Government) and the George A. Fuller Company (the Contractor), for the construction of a Conservatory for the U. S. Botanic Garden, Washington, D. C., and in consideration of the payment by the Government of the total sum of $633,582.46, the receipt of which is acknowledged, the Contractor does hereby release the Government from all claims arising under or by virtue of said contract, with the following exceptions:

Items	*Amount of additional claims*	
Architectural aluminum	$14, 897. 12	
Cold water piping	454. 21	
Reinforcing of dome	4, 658. 00	
Grading site	1, 415. 00	
Top soil	355. 00	
Piles	65, 277. 54	
Miscellaneous job costs, account delays	20, 926. 00	
Amount deducted by Architect of the Capitol in connection with substitution of plain bedding putty for alumilastic; and amount deducted in connection with rejected slate tablet	604. 53	
Total additional claims		$108, 537. 40
Less: the following amounts recommended for approval by the Architect of the Capitol and included in total of $633,582.46 recommended as final payment price under contract as indicated on final payment voucher:		
Amount of additional claims recommended by Architect of the Capitol for approval		
Items		
Architectural aluminum	$1, 755. 93	
Reinforcing of dome	3, 115. 00	
Piles	1, 860. 30	
Total		6, 731. 23
Amount claimed in addition to the total of $633,582.46		101, 806. 17

Opinion of the Court

Amount of additional claims recommended by Architect of the Capitol for approval—Continued.

Less: Deductions recommended by this office as follows:	
Plain bedding putty substituted for alumilastic: 8,400 lb. @ 4¢ per lb.	$[illegible]36.00
Deduct: Est. handling costs on alumilastic delivered to job & returned	18.00
Total	318.00
Less: Deduction for rejected slate tablet containing a carved inscription	286.53
Total deductions	604.53
Total amount claimed under contract:	
Recommended for approval by Architect of the Capitol	633,582.46
Not recommended for approval by Architect of the Capitol	101,806.17
Total amount of claims	735,388.63

Signed under protest.

GEORGE A. FULLER CO.,
W. G. DISTLER, *Vice Pres.*
W. G. DISTLER, *Vice Pres.* [SEAL]

Executed at Washington, D. C. this 23rd day of October, 1933.
GEORGE A. FULLER COMPANY,

In the presence of:

The Architect entertained and considered the claim, but referred its settlement to the Comptroller General. With the reference to the Comptroller General the Architect made his recommendations thereto, but furnished no copy of his recommendations to the plaintiff, nor did he transmit to the plaintiff any findings of fact except as may appear in the findings of fact made herein.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff was the general contractor for the construction of a conservatory for the United States Botanic Garden, Washington, D. C. The consideration was $604,000, and the conservatory was to be built along novel and monumental lines. The contracting officer was the Architect of the Capitol, referred to as the Architect, and he also was the "head of the department" concerned.

The project was unique in greenhouse construction. It was distinguished for its extensive use of aluminum, both architectural and structural. The emphasis can hardly be on one rather than the other, for the parties had difficulties with both. Surrounding the framework of aluminum was the inevitable glass of greenhouse construction, adverted to as the "skin," and with this there was difficulty also. The fact is, the parties were invading a relatively unexplored field, and the defendant had not concluded all necessary preliminary tests, experiments and investigations, choosing rather to accomplish some of those matters as they presented themselves in practice. The final structure was to embody the beautiful, the practical, and the unique, and procedure more or less step by step was anticipated by both parties.

The contract time was 270 days from June 16, 1931, and the date for completion not beyond March 12, 1932. The project was completed and accepted January 13, 1933, a delay of 307 calendar days.

Pile-driving.—Passing for the moment the initial work of leveling the site, we consider driving of the piles. The plaintiff rightfully assumes some responsibility for an initial delay in driving of the foundation piles, at least it claims no damages for such delay. This delay therefore need not be discussed at any length. The fault lay not altogether with the plaintiff, but its mutality prevents any recovery by the plaintiff and the plaintiff seeks no recovery.

The delay amounted to something over two months, and the plaintiff readjusted its schedule accordingly. It may be noted here that the defendant charged no liquidated damages against the plaintiff for this or for any other delay.

Leveling site.—The defendant's part of the work included preparatory leveling of the site. The Government expected to do this by separate contract, but did not consummate this part of its work, and the burden was placed upon the plaintiff. The plaintiff started with its work promptly and there is no indication that it was remiss on the question of industriousness. The plaintiff, not finding the site in the condition promised, nevertheless moved in and went ahead with com-

mendable expedition. From that time on leveling of the site was a different proposition, almost, if not quite, disappearing from the picture, for the work itself created heights and depressions not theretofore present, and much of the argument on what the parties should then have done approaches the academic. Finally plaintiff had to bring in a net fill amounting to 1,340 cubic yards, due to defendant's breach of the agreement. The damages are found to be at the rate of $1.00 per cubic yard, and the plaintiff is entitled to recover $1,340.00.

Top-soil.—It was the defendant's duty to furnish the top-soil. The top-soil was naturally of some concern to the Government. It was to be used for planting. The plaintiff did not receive the top-soil in time to place most economically, and had to shore up planting areas, shoring which would not in its entirety have been necessary had the top-soil been at hand when the plaintiff asked for it. It was about five months after plaintiff first requested the top-soil, that the top-soil began to arrive at the site. The exact extent of time taken by the Government to deliver the top-soil is of no moment, for damages in the way of overhead for delay are not claimed. The claim is for temporary shoring and runways which plaintiff says would not have been necessary had the top-soil been delivered when requested. But the date for delivery was within the control of the Government, for no date for delivery was specified. The Government began deliveries September 29, 1932, and whatever the reason for choosing that date, there was no obligation on the Government's part to deliver sooner. Completion of the contract was not delayed and it was within the discretion of the Architect or his representatives as to when the top-soil should be laid. There is no sufficient showing that this discretion was abused, and plaintiff may not recover.

Reinforcing dome.—Reinforcing of the dome illustrates the developmental character of the project. The framework of the dome was constructed by the plaintiff in accordance with plans and specifications. There is no question about that. But, after the erection of this framework, the Government engineers became suspicious as to its strength. The

Bureau of Standards was brought in to make tests, and, as a result of these tests, additional bracing was decided upon. The plaintiff was asked for an estimate, which was furnished in the amount of $4,658.00, based on a subcontractor's quotation, with overhead and profit added thereto. The Architect rejected the proposal, the plaintiff refused to recede. The Architect referred the matter to the Comptroller General, who decided that the price for the extra work was $2,000 per ton for structural aluminum, plus $100 to cover "excess cost due to performance of the work after the other work had been completed." The bracing required the use of 1.5075 tons of aluminum.

The contract did not authorize the price of an order for extra work to be determined by the Comptroller General, but the Architect deferred to his decision in fixing the price. The plaintiff was plainly entitled to the judgment of the Architect.

However, the contract did provide for the use of unit prices in arriving at increases in the contract price for extra work. Here it was $2,000 per ton on 1.5075 tons, $3,015.00. But this was to be the *basis* to be used. The contract did not forbid extra compensation for the extra labor necessary. This was apparently the view of the Comptroller General, for he allowed an additional $100 for cost of performance. The price demanded by the plaintiff is not set forth as price of material (limited to $2,000 per ton) plus price of labor. There is therefore no foundation shown for anything over $100 and plaintiff is not entitled to recover any excess over the amount already received.

Experimental work.—As heretofore indicated, the project was largely developed as construction progressed. It is sometimes described in the record as experimental. We prefer to characterize it as a development. However, one of the items is claimed as "experimental" work.

The contract provides that:

> Tests when required by the Architect shall be made by and at the expense of the Government.

The Lord & Burnham Company held the subcontract with the plaintiff for architectural aluminum and for glazing, and

for the installation thereof. Not having fully developed its plans for glazing, the Government's supervising architects during the contract period called upon that subcontractor to make certain experiments, or try out proposed devices for glazing. There were technical difficulties in glazing with aluminum, and apparently the supervising architects were not equipped to make these trials, or tests. The contract provided that the tests were to be made "by" and at the expense of the Government. The Government of course works by instrumentalities. Instructions given by the supervising architects to the subcontractor show plainly enough that the work outlined for the subcontractor was in the final analysis tests to be made "by" the Government, just as the work done by the supervising architects, representing the contracting officer, was work done "by" the Government. The work was also to be "at the expense" of the Government and that meant that the Government should pay for it. The subcontractor perfected a practical glazing bar and cap, which was accepted by the Government, and the prime contractor, suing here, is entitled to the cost plus overhead and profit, a total of $397.56. There is no contention that the amount is unreasonable.

Extra belt course.—This claim is for extra work and material, amounting to $827.20. We are without any extra work order, issued as such, but the supervising architects did issue a supplemental drawing requiring the installation of this extra belt course, not shown in the original contract drawings. The contracting officer was within his authority in adding to the contract drawings, and the contract contained the standard provision that anything shown on the drawings and not mentioned in the specifications should be as effective as those shown or mentioned in both. Plaintiff was thus required to do the work. A formal written order, specifying extra work, is an addition to the specifications.

Article 5 of the contract is worth quoting in full. It is as follows, the italics being supplied:

> *Except as otherwise herein provided*, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

No such order was issued by the contracting officer. What he did was to avail himself of a procedure permitted under the excepting clause of Article 5. He attained the same end by an extra contract drawing. Whatever requirement there was that the order should be approved in writing by the head of the department was satisfied when the Architect approved the drawing under which the extra work and material were furnished. The drawing is not a place on which to state a price. If it should state a price, something unheard of, it would be more than a drawing. The thing absent here is a stated price. There is no presumption that its omission from the contract drawing or the neglect to issue worded specifications is a decision by the contracting officer and head of the department that the extra work and material were to be furnished the Government gratuitously. The plaintiff was required by the contract to proceed with the work. This it did, and is entitled to recover its costs, plus overhead and profit, which the findings state at $827.20.

Rafter caps.—The plans failed to provide for rafter caps, a device for securing scaffolding. Scaffolding was necessary for the replacement of broken glass. It was the subcontractor that called the supervising architects' attention to this lack of detail. Thereupon the supervising architects prepared drawings showing the extra work and material to be supplied, and these additional drawings received the approval of the Architect. As in the instance of the extra belt course, no formal change order was issued naming the price. But it was by no means extra work and material done and furnished without any order whatever. The extra-work-order provision of the contract was unquestionably meant to safeguard against extra work done by the contractor without sanction of the contracting officer or head of the department. Here the contracting officer and head of the department made additions to the contract drawings in such manner as to leave the contractor no recourse except to do the extra work and furnish the extra material. There is of record nothing to indicate what the Architect considered to be the appropriate price

for this extra. The plaintiff is entitled to recover $8,202.34, which includes overhead and profit.

Returned gutter ends, $769.44
Glazing bar, $610.58
Extrusion of gutter in two parts, $3,439.02
Top members of belt course; small gutter for border houses, $446.69

The comments made with respect to extra belt course and rafter caps apply to these four items. They were covered by extra drawings, involving extra expense, all approved by the Architect, and plaintiff is entitled to recover on all of them.

The claim of $1,340.00 in connection with leveling of the site is for breach of contract, and not within the Architect's jurisdiction.

The other claims, within the cognizance of the Architect, aggregate $14,692.83, and were presented to the Architect. The Architect referred them to the Comptroller General with the statement that "the contractor did not notify this office within 10 days as required by the contract." But the provision in the contract thus referred to by the Architect made the exception: "unless the contracting officer shall for proper cause extend such time." By entertaining the claim and recommending to the Comptroller General an allowance thereon, the Architect waived the ten-day limitation, which he had a right to do for proper cause, and we think here, certainly in view of the nature of the work, long-drawn out, complex and developmental, there existed a proper cause. The time requirement, in appropriate circumstances, may be waived. The contracting officer was not recommending a gratuity to the plaintiff; he was recommending an allowance claimed and supposedly due under contract terms. It must be held that the contracting officer waived the time limitation for assertion of a claim. *Thompson et al* v. *United States*, 91 C. Cls. 166, 179. From the otherwise allowable total of $14,692.83 there is to be deducted the sum of $1,755.93 which came to the plaintiff through the Comptroller General's settlement, a net allowance in judgment of $12,936.90. The sum of $12,936.90, so arrived at, added to the claim of $1,340.00 in connection with leveling of the site, gives an

allowable total of $14,276.90, referred to at the conclusion of this opinion.

This brings us to the subject of plaintiff's claim of damages for delay.

For the initial delay, in pile-driving, some 80 days, the plaintiff makes no claim for damages, and the defendant assessed no liquidated damages for this delay or for that matter, any other delay. Both parties apparently contributed to this delay, although perhaps not equally. A new completion date was scheduled by the plaintiff, and there the matter rested.

There were other numerous delays and the findings of fact fix the responsiblity for them. The Architect very properly disavowed any authority to make the plaintiff whole for damages for delay. All he could do was to waive liquidated damages and he recommended to the Comptroller General, to whom he had submitted the matter, that they be waived. In his recommendation to the Comptroller General he assumed the responsibility for all delay in completion. But as he was then referring to the question of imposing liquidated damages for delay, we can not take that as an admission that the Government's delays were unjustifiable under the terms of the contract.

Responsibility is not liability. The defendant is not liable in damages for delay permissible under the contract, notwithstanding it is responsible for the delay. See *Silberblatt & Lasker* v. *United States*, 101 C. Cls. 54, 82, citing *Magoba Construction Co.* v. *United States*, 99 C. Cls. 662, 689, and *United States* v. *Rice*, 317 U. S. 61, 64.

At the outset bidders were informed as to the immature status of the plans. Article No. 1 of the special instructions to bidders (quoted in Finding No. 2) stated expressly that it had been decided that an *attempt* would be made to use aluminum for glazing, and structurally, that bidders were requested to study the matter, and that a *research* laboratory was available to them.

Research takes time and is prone to be indefinite in extent. This situation was well within the knowledge of both contracting parties. The liquidated-damage clause gave relief to the contractor in the event of prolonged research, and

gave the Government leeway in the time it might take to develop and perfect plans, as the need for such development and perfection arose.

As early as 1878 this Court held that novelty of a project was an element to be considered in appraising the reasonableness of delays incident to changes. *Swift et al* v. *United States*, 14 C. Cls. 208, 231, citing *Chouteau* v. *United States*, 95 U. S. 61.

In only one instance is it expressly found that delay occasioned by the defendant was unreasonable. That delay arose through rejection by the Government inspector of loose-fitting bolts, where the Architect had approved them. The inspector thought they should be tight-fitting. It took 78 days for the Government to arrive at a final decision. There was disagreement on the matter even within the Government ranks, but the inspector seems to have been alone against the field. The indecision delayed completion of the contract, but to what extent can not be determined.

There were other delays, some having to do with the so-called "experimental" use of aluminum, others not, but still delaying completion of the contract. Almost all of them were alleged to be delays in making decisions. The defendant was entitled to a reasonable length of time to arrive at decisions on changes, which these were, for changes were authorized by the contract, with additional time for performance, allowable by the contracting officer. We can not say that the entire delay in completion, due to the time taken to make decisions, was unreasonable. It is true in some instances delays seem to border on the unreasonable. But when we have a contract for a novel type of construction, which necessarily requires considerable deliberation on changes, and the contractor was made aware of this situation by due and formal notice, we must conclude that the Government was entitled to a liberal extent of time to decide on changes.

We are unable to say from the record before us to just what extent the plaintiff was, to its damage, delayed by the defendant without justifiable cause. However, acting as would a jury, considering the proof that we have in a fair

and reasonable manner, we arrive at the sum of $2,500 by way of a jury verdict, as the damages sustained by the plaintiff through such of defendant's delays as were not justified under the terms of the contract.

The plaintiff is entitled to recover the sum of $14,276.90, heretofore mentioned, and in addition the sum of $2,500.00 for delays, a total of $16,776.90. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

J. C. RIDNOUR COMPANY v. THE UNITED STATES

[No. 44741. Decided June 4, 1945]

On the Proofs

Government contract; liquidated damages for delay.—Plaintiff entered into contract with the Government to furnish denim working jumpers in accordance with a schedule of supplies and specifications. Liquidated damages were deducted for failure to deliver the jumpers on time. Plaintiff claimed that delay in delivery was due to "unforeseeable" causes when truck hauling material necessary for plaintiff's manufacture had been delayed by an ice storm. It was *held* that, while the ice storm might have been expected at that time of the year, it was not foreseeable that its truck would stall on the road, and another truck would skid into it, and plaintiff is entitled to recover for liquidated damages charged for this delay of five days.

Same;—There was no satisfactory evidence to support plaintiff's contention that the Government inspector had changed the specifications, as claimed by plaintiff, and plaintiff is not entitled to recover liquidated damages deducted for delay caused by the inspector's orders.

The Reporter's statement of the case:

Mr. David A. Fegan for plaintiff. *Messrs. Morris, Kix-Miller & Baar* were on the brief.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Nebraska, with its principal office and place of business at Lincoln, Nebraska.

2. January 14, 1935, plaintiff, following a bid by plaintiff and acceptance thereof by defendant, entered into a contract with the defendant represented by E. J. Heller, Captain, War Department, Philadelphia Quartermaster Depot, Philadelphia, Pennsylvania, as its contracting officer, whereby plaintiff agreed to furnish and deliver to the Chicago Quartermaster Depot, Chicago, Illinois, 25,000 blue denim working jumpers at the price of $0.80 each, in accordance with a schedule of supplies, specifications, and standard government form of bid therein specified. Deliveries were required to be made according to the following schedule:

20% within 25 days after date of contract, and 20% each ten days thereafter, until the completion of deliveries, viz:

Date:	*Quantity*
February 8, 1935	5,000
February 18, 1935	5,000
February 28, 1935	5,000
March 10, 1935	5,000
March 20, 1935	5,000
Total	25,000

The contract provided that the contractor should pay to the Government, as liquidated damages for each unit undelivered, a sum equal to one-fifth of one percent of the price of each unit for each day's delay after the date or dates specified for delivery, but subject to a proviso that the contractor should not be charged with liquidated damages if the delay in delivery should be "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but not including delays caused by subcontractors. * * *"

3. Plaintiff, having been notified by letter of January 8, 1935, that its bid had been accepted, purchased at Chicago,

Illinois, seven bales of material with which to make the jumpers and, in order to save time, had them shipped from Chicago to its plant at Lincoln, Nebraska, by truck of the Nebraska Transit Lines instead of by railroad. The truck left Chicago on January 15, 1935, and ordinarily would have reached Lincoln on January 17, 1935. However, when it reached a point near Clinton, Iowa, it became stalled at the bottom of a hill because of a sheet of ice that had just covered the highway and, while stalled, was struck and damaged by another westbound truck that was out of control because of the ice. The repairs made necessary by the accident were not completed until January 20, at which time another coat of ice had formed over the area, and the material was not delivered to plaintiff at its place of business in Lincoln until January 22, 1935. Such ice and temperature (the temperature on January 16 going down to 15 above and on January 20 and 21 down to 2 above and 10 below, respectively), although not continuous, were not infrequent in the area at that time of the year.

In the meantime plaintiff had received another shipment of material by railroad and, on January 21, 1935, had begun the work of manufacturing the jumpers. Plaintiff thus was delayed in the manufacture of the jumpers from January 17 to January 21 because of the late arrival of the truck.

4. January 25, 1935, plaintiff wrote to Captain Heller, the contracting officer, asking for a week's extension of time because of the late delivery of the material by truck and on January 29, 1935, Captain L. O. Grice, the new contracting officer, wrote plaintiff that the contracting officer did not have authority to grant extensions of time, but stating as follows:

> * * * Upon the completion of your contract if liquidated damages have been deducted from your account which, in your opinion, were due to conditions coming within the scope of those mentioned in the liquidated damage clause in your contract, you may file a claim for the refund of all or any part thereof with the Comptroller General of the United States. Such claim, when and if filed, should be sent to this Depot under cover where will be attached certain papers required and administrative recommendation in regard thereto.

5. Plaintiff made large deliveries of the jumpers to the Chicago Depot on February 14 and 25, and March 1, 1935, but upon inspection of the first shipment by the Government's inspectors there, about 70 percent thereof were rejected because of open passover seams under the arms, missing buttons, punch holes in the cloth which had been made to mark the location of the pockets and which had not been properly covered by the pockets, and other defects. As a result of these inspections and rejections, the commanding officer at the Chicago Depot, on February 28, 1935, telegraphed plaintiff that unless future shipments were much less deficient wholesale rejections would be made.

6. Shortly after the receipt by plaintiff of the telegram of February 28, 1935, its superintendent, Mr. Hugh V. Herman, practically shut down plaintiff's plant and went to the Chicago Depot and had a conference with the officers there. Mr. Herman, while in Chicago, made an arrangement with Eckerling Bros., a Chicago concern, to take the rejected jumpers, repair the defects and redeliver them to the Chicago Depot, which Eckerling Bros. did. Later Eckerling Bros. repaired additional jumpers which were rejected after Mr. Herman's visit to Chicago. Mr. Herman, after three days in Chicago in which he learned of all the various kinds of defects which had caused the rejections, returned to Lincoln and reopened the plant. However, several days had to be spent in repairing defective jumpers which had been made but not yet shipped to the Chicago Depot.

Mr. Herman's trip to Chicago cost plaintiff $50, plaintiff paid Eckerling Bros. a total of $425 for repairing rejected jumpers, and the shutting down of the plant and the repairing of defective jumpers there cost plaintiff approximately $500, and a delay of a week or more in completing the manufacture and delivery of jumpers.

7. Following the reopening of the plant, the manufacture, and also the delivery of the jumpers from time to time, continued until the last delivery and acceptance thereof was made on April 17, 1935. However, there were from time to time rejections during the entire performance of the contract (even of some of the repaired jumpers—thus necessitating re-repairs) and, by permission of the defendant, plaintiff had

Eckerling Bros. make approximately the last 5,000 jumpers by subcontract. Altogether a total of 24,697 jumpers were manufactured and delivered under the contract and no question was raised by the Government with reference to the nondelivery of the remaining 303 jumpers which would have had to be manufactured and delivered to make up the full 25,000 contracted for.

8. The following schedule reflects deliveries required by the contract, the actual deliveries (jumpers accepted after inspection), and the liquidated damages accrued and deducted under the contract:

Quantity	Due	Delivered	Delay	Liquidated damages		Voucher
				Due	Deducted	
614	2/8	2/14	6	$5.89	$48.00	732
1,040	2/8	2/25	17	28.29	133.19	1988
1,738	2/8	3/9	29	80.64	----------	6066
700	2/8	3/9	29	32.48	275.14	6133
124	2/8	3/11	31	6.15	----------	6655
784	2/8	3/11	31	38.89	----------	6133
2,472	2/18	3/11	21	83.06	----------	6133
2,528	2/18	3/15	25	101.12	----------	6655
234	2/28	3/15	15	5.62	----------	6655
2,133	2/28	3/18	18	61.43	127.06	6655
981	2/28	3/21	21	32.96	44.64	7409
1,380	2/28	3/22	22	48.48	----------	7408
272	2/28	3/22	22	9.57	----------	7407
522	3/10	3/22	12	10.02	18.64	7407
520	3/10	3/23	13	10.82	----------	876
526	3/10	3/23	13	10.94	15.16	877
1,146	3/10	3/25	15	27.50	26.98	803
1,157	3/10	3/26	16	29.62	11.66	1299
679	3/10	3/27	17	18.47	9.81	1300
450	3/10	3/28	18	12.96	8.72	1760
898	3/20	3/28	8	11.49	----------	1760
816	3/20	3/30	10	13.06	13.13	3765
116	3/20	3/30	10	1.86	----------	5045
411	3/20	4/2	13	8.55	15.22	3764
699	3/20	4/4	15	16.78	8.83	4669
212	3/20	4/5	16	5.43	----------	5045
999	3/20	4/5	16	25.57	3.30	4670
129	3/20	4/8	19	3.92	----------	6313
343	3/20	4/12	23	12.62	9.51	1604
22	3/20	4/16	27	.95	2.41	6312
52	3/20	4/17	28	2.33	.57	6355
				757.57	771.97	
Less refund on voucher				----------	.82	
				----------	771.15	
Less liquidated damages due				----------	757.57	
Overdeduction				----------	13.58	

Of the total liquidated damages deducted, $197.58 was attributable to the delay of five days due to the wreckage of plaintiff's truck.

9. At one period in the manufacture of the jumpers plaintiff used sewing thread that did not comply with the specifications. A total of 1,320 jumpers were made with this defective thread. Defendant accepted these jumpers but under

an agreement with plaintiff that defendant should deduct 3 cents per jumper (a total of $39.60) because of the defective thread.

10. Defendant, without deducting the $39.60 for the defective thread, paid plaintiff for all the jumpers it manufactured and delivered, except that defendant deducted $771.15, liquidated damages, for failure to deliver within the times required by the contract, and plaintiff then filed a claim with the Comptroller General in the total sum of $1,746.15, as follows:

1. Liquidated damages	$771.15
2. Paid Eckerling Brothers, Chicago	425.00
3. Expense of Mr. Herman's trip to Chicago	50.00
4. Additional plant costs to repair undelivered jumpers	500.00
Total	1,746.15

The Comptroller General disallowed the claim. However, it was found that defendant had deducted $13.58 too much liquidated damages and this sum was offset against the $39.60 agreement or settlement resulting from the use of the defective thread. The difference, amounting to $26.02, was paid by plaintiff to defendant in July 1938.

11. There is no satisfactory evidence to support plaintiff's contention that the defendant's inspector at plaintiff's plant, Mr. William Nonnast, ordered changes in plaintiff's process of manufacture, i. e., in the method of marking the location of pockets, the construction of the front center openings, the method of making the collars, and the delivery of jumpers with skipped stitches in the passover seams under the arms, and that in obedience to such orders plaintiff changed its process of manufacture with the result that plaintiff was delayed in the manufacture of the jumpers and that when plaintiff did deliver them they were rejected because of said changes in process and skipped seams, thus causing most of the first item and all of the second, third and fourth items of plaintiff's claim set out in Finding 10. Moreover, the reports which Mr. Nonnast made to defendant from time to time while he was the defendant's inspector at plaintiff's plant were also signed by plaintiff and contained a note that:

> Inspector has no authority to issue orders. His statements must be considered as advice only.

The provision in the contract with reference to inspection was:

ARTICLE 4. *Inspection.*—(*a*) All material and workmanship shall be subject to inspection and test at all times and places and, when practicable, during manufacture. The Government shall have the right to reject articles which contain defective material or workmanship. Rejected articles shall be removed by and at the expense of the contractor promptly after notification of rejection.

(*b*) If inspection and test, whether preliminary or final, is made on the premises of the contractor or subcontractor, the contractor shall furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient inspections and tests required by the inspectors in the performance of their duty. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. Special and performance tests shall be as described in the specifications. The Government reserves the right to charge to the contractor any additional cost of inspection and test when articles are not ready at the time inspection is requested by the contractor.

(*c*) Final inspection and acceptance of materials and finished articles will be made after delivery, unless otherwise stated. If final inspection is made at a point other than the premises of the contractor or a subcontractor, it shall be at the expense of the Government except for the value of samples used in case of rejection. Final inspection shall be conclusive except as regards latent defects, frauds, or such gross mistakes as amount to fraud. Final inspection and acceptance or rejection of the materials or supplies shall be made as promptly as practicable, but failure to inspect and accept or reject materials or supplies shall not impose liability on the Government for such materials or supplies as are not in accordance with the specifications. In the event public necessity requires the use of materials or supplies not conforming to the specifications, payment therefor shall be made at a proper reduction in price.

There was no provision in the contract giving the inspector the right or power to issue orders to the plaintiff.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues for liquidated damages deducted for delays in furnishing blue denim working jumpers. Plaintiff says they were unlawfully deducted because the delays were caused, first, by a delay in the delivery to it of the material out of which the jumpers were to be made, and that this was caused by an ice storm, which it says was one of the "unforeseeable" causes of delay for which the contractor was not to be charged with liquidated damages; and, second, by orders of the defendant's inspector on the job, changing the specifications, which caused the jumpers to be rejected.

With reference to the first cause of the delay plaintiff says the truck which was delivering to it the material for the manufacture of the jumpers was wrecked, due to ice on the road. The Commissioner has found that "such ice and temperature, * * * although not continuous, were not infrequent in the area at that time of the year." No exception is taken to this finding. However, although the plaintiff might have foreseen that there might be ice on the roads at that time of the year, we do not think that plaintiff could have foreseen that its truck would stall on the ice and that another truck would skid into it. We are of the opinion that plaintiff should not have been charged with liquidated damages for this five days' delay.

With reference to the second cause of the delay, the Commissioner has found:

> There is no satisfactory evidence to support plaintiff's contention that the defendant's inspector at plaintiff's plant, Mr. William Nonnast, ordered changes in plaintiff's process of manufacture, i. e., in the method of marking the location of pockets, the construction of the front center openings, the method of making the collars, and the delivery of jumpers with skipped stitches in the passover seams under the arms, and that in obedience to such orders plaintiff changed its process of manufacture with the result that plaintiff was delayed in the manufacture of the jumpers and that when plaintiff did deliver them they were rejected because of said changes in process and skipped seams, thus causing most of the first item and all of the second, third, and fourth items of plaintiff's claim set out in finding 10. Moreover, the reports which Mr. Nonnast made to defendant from time to time

while he was the defendant's inspector at plaintiff's plant were also signed by plaintiff and contained a note that:

"Inspector has no authority to issue orders.
His statements must be considered as advice only."

We have carefully examined plaintiff's exceptions to this finding, and we find that they are not supported by the evidence.

Plaintiff also claims damages for the delays it says were caused by the inspector's orders changing the specifications. Plaintiff is not entitled to recover these damages for the reason set out above.

Plaintiff is entitled to recover the amount of liquidated damages deducted which were attributable to the five days it was delayed by the wreckage of its truck. This amounts to $197.58. Judgment for this amount will be rendered. It is so ordered.

Madden, *Judge*; Littleton, *Judge*; and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

ALFRED OSCAR SCHAFFER *v.* THE UNITED STATES

[No. 45990. Decided June 4, 1945]

On the Proofs

Requisition of goods for war purposes under the Act of October 16, 1941; valuation.—An operator of an automobile and truck "graveyard", who bought used and damaged automobiles and trucks from which he disconnected and sold used "parts", tires and tubes, the remainder of the automobiles or trucks being eventually sold as scrap or junk, was entitled to more than the "scrap" value of his entire stock of goods when they were requisitioned for Government use under the provisions of the Act of October 16, 1941 (55 Stat. 742).

Same; just compensation.—Having been awarded $4,157.80 as the "scrap" value by War Production Board, and having been paid and accepted 50 percent of the amount of the award, with the right to sue in the Court of Claims under the provisions of the 1941 Act; it is *held* that in addition to the $2,078.90 heretofore paid and received, plaintiff is entitled to recover $4,171.10 with interest at 4 percent per annum as provided by law, as a part of just compensation.

The Reporter's statement of the case:

Mr. Glenn Thomas Cousins for the plaintiff. *Messrs. Miller, Miller & Cousins* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, on June 17, 1942, was a citizen of the United States and a resident of Clinton, Iowa, where he was engaged in the business of operating what is commonly called an automobile and truck "graveyard." He bought used and damaged automobiles and trucks from which he disconnected and sold used "parts," tires and tubes, the remainder of the automobiles or trucks being eventually sold as scrap or junk. Occasionally he bought and held for resale an entire used automobile or truck.

2. Plaintiff's "graveyard" covered several acres of open land on which there was a shed and two small buildings. The used and damaged cars and trucks which plaintiff had purchased and still had on hand at the time of the requisition hereinafter dealt with were scattered about the premises and plaintiff had taken many of the "parts" from them and had sold the parts. In getting to many of the parts which plaintiff had sold he had been compelled to remove from the cars and trucks many other parts which he had left inside, under, or near the cars or trucks—sometimes putting the hoods of the cars or trucks under the parts to better preserve them. Some parts which plaintiff had removed from the cars or trucks had been taken into and stored in the shed and buildings to protect them from the weather, but in the main plaintiff had left the parts on, in, under or near the cars or trucks. Some of them were being damaged by exposure to the weather. Plaintiff had removed many of the tires from the cars and had stored the better ones inside the shed but had left others outside the shed. Other tires had been left on the cars or trucks. Plaintiff had stored many tubes to protect them from the weather.

At the time of the requisition there were, in all, 177 cars or trucks or hulks of cars or trucks on the yard, of which

plaintiff was holding four with the hope of selling them as used cars or trucks.

3. On May 2, 1942, after plaintiff had learned that his property would probably be requisitioned by the defendant, as it later was, he wrote to Mr. Donald Nelson, Chairman of the War Production Board, as follows:

> Correspondence received by me from the Chicago office of the War Production Board leads me to believe that that Chicago office shall soon recommend you to requisition the contents of the auto graveyard which I operate at the above address, compensation to me for all merchandise so taken to be at junk prices.
>
> Such requisition at junk prices is unfair to me in the extreme. I believe that such a procedure is taken by the governmental agencies without a thorough understanding of the business of operating an "auto graveyard" or "used parts lots." We who operate such a business seldom buy a used car for resale as a used car and seldom buy a used car for junk exclusively but rather the great majority of our purchases are of aged used cars from which we take usable parts for resale and junk the remainder of the car. Such purchases are made at a price greater than junk prices. Also after such purchases we do not remove those usable parts until called for by a customer; thus avoiding running up a huge labor bill incurred by removing large numbers of parts, only a fraction of which would ordinarily be sold in the regular course of our business. Therefore, compliance on our part with a governmental order to remove all usable parts at once and junk the remainder of our merchandise would result in a heavy financial loss to us for we would incur a tremendous labor bill removing many parts which would never be sold as "parts."
>
> I am fully cognizant of my duty as an American to aid in our common cause at this critical hour and accordingly make no complaint about losing my business which I now have well established after four years of hard work and many sacrifices. But I do not believe it fair to take all the property that I have accumulated during those years of work, the present contents of my said auto graveyard, at junk prices.
>
> I will sell, willingly, all the contents of my said business at a price set by impartial appraisers, the value to be determined by the price which can be obtained by one in my business in this locality when such merchandise

> is handled as we in our business do in the ordinary course of our business. I do not desire a profit but merely wish to save my life's earnings, if possible, and to receive reasonable value for property taken from me by my government.
>
> May I hear from you respecting the above at your earliest convenience?

4. Under date of May 8, 1942, Mr. Merrill Stubbs, Deputy Chief Automobile Graveyard Section, Bureau of Industrial Conservation of the War Production Board, replied to plaintiff's letter of May 2, 1942, as follows:

> Mr. Nelson has asked me to acknowledge your letter of May 2. I think it is in point to quote fully the letter which Mr. Nelson addressed to all graveyard owners:
>
> "Iron and Steel are vitally needed to make the weapons of war and this material in your junk cars can be of great assistance if made available now. We know that you will cooperate with your Government in our great effort. The War Production Board has asked the iron and steel industry to see to it that fair offers are made to you by the agents of the industry, scrap material dealers, and others. The Office of Price Administration requires these autos to be so priced that the resultant prepared scrap will not exceed the ceiling prices delivered to the mills. If you deal in used parts you may retain a reasonable supply, bearing in mind that excessive inventories are forbidden.
>
> "If you reject an offer the Government will examine as to its fairness and in those cases where fair offers have been rejected the Government will, if advisable, requisition the entire yard, including parts. The Government is faced with the responsibility of seeing to it that the steel mills and foundries are kept at maximum production."
>
> We hope that the requisite procedure is not too inconvenient, but must insist that it be followed. In the case of requisition, if you feel that you have not received fair compensation for the contents of your yard, you may request relief from the Court of Claims.

5. On June 17, 1942, the defendant, acting pursuant to the powers conferred by the Act of October 16, 1941 (55 Stat. 742), as amended, requisitioned and, with the exception of a few items which it overlooked, took possession of all of

plaintiff's property mentioned in findings 1 and 2, the property being described in the requisition as follows:

> All scrap metals, including used automobiles and parts thereof, and all scrap rubber, including used tires and tubes, owned by A. O. Schaffer, 1501 Lincoln Highway, Clinton, Iowa.

The defendant, with blow torches, cut up all the automobiles and trucks and hulks thereof on the yard, including the four which plaintiff was holding for resale, and, after some separating of the metals and parts thus obtained, hauled them away to the scales. The defendant also took and hauled away all parts, tires, and tubes, the only property left on the yard being a few items which were overlooked by the defendant. At or before the weighing everything was classified into the various kinds of scrap materials mentioned in finding 6. Nothing was classified as a saleable part, tire, or tube, i. e., as an article which could be used by a purchaser for the purpose for which it had been made.

6. On October 14, 1942, the defendant, acting through the War Production Board, made a preliminary determination of value of the property which it had requisitioned and taken from plaintiff. This preliminary determination set a value of $4,157.80, and was computed on the basis that all of the property was "scrap." The scrap price applied to each class of material, in setting that value, was as follows:

#2 Heavy Melting Steel (prepared)	$14.56 a gross ton.
#2 Heavy Melting Steel (unprepared)	$11.20 a gross ton.
#2 Bundles (body and fender scrap)	$5.60 a gross ton.
Motor Blocks	$18.48 a gross ton.
Unstripped Motor Blocks (unprepared cast)	$16.24 a gross ton.
Brass	4½ cents a pound.
Radiators	6½ cents a pound.
Aluminum	8 cents a pound.
Breakage	2 cents a pound.
Generators and Starters	2 cents a pound.
Batteries	2.39 cents a pound.
Tubes	4 cents a pound.
Tires	$23.00 a net ton.

If the property had in fact been all scrap, these prices would have been fair and adequate.

7. On November 21, 1942, the defendant, acting through the War Production Board, made an award of compensation in the amount of $4,157.80 for plaintiff's property requisitioned and taken by defendant, but plaintiff being unwilling to accept that sum as full compensation, the defendant, on January 5, 1943, pursuant to the Act of October 16, 1941 (55 Stat. 742), paid plaintiff $2,078.90, which was 50 percent of the amount of the award.

8. With a few minor exceptions which, at plaintiff's valuations, reduce the total from $13,057.32 to $12,263.84, plaintiff had on hand the property listed in Exhibit B to his petition, and this was the property taken by the defendant under the requisition. The values attributed to the property by plaintiff in Exhibit B are too high, as is shown in finding 9.

Plaintiff's total claim is $12,263.84 and is arrived at by listing the tires and tubes at the prices at which plaintiff asserts that he expected to sell them for use by his customers, and deducting therefrom 20 percent, and by listing the automobiles and trucks and parts thereof at the prices at which plaintiff asserts that he expected to sell them for use by his customers and deducting therefrom 33⅓ percent. The 20 percent and 33⅓ percent deductions are made by plaintiff on the theory that the requisition amounted in effect to a bulk sale.

9. Of the property which the defendant requisitioned and took from plaintiff and for which it made an award at only scrap prices, plaintiff could reasonably have expected to dispose of about 20 to 30 percent thereof to customers for use on automobiles, and at retail prices for each article somewhere near the prices on which plaintiff bases his claim, from which prices he has deducted the discounts for bulk disposition, as shown in finding 8.

By deducting those percentages from the scrap price award of $4,157.80 and adding to the remainder similar percentages of the bulk sale calculation of $12,263.84, the following sums are obtained:

Opinion of the Court

Calculation at 20%

Award (scrap prices)	$4, 157. 80
Less 20% of (scrap price) award	831. 56
	3, 326. 24
Add 20% of (bulk sale price) $12,263.84 claim	2,452. 77
Value resulting from calculation	5, 779. 01

Calculation at 25%

Award (scrap prices)	$4, 157. 80
Less 25% of (scrap price) award	1, 039. 45
	3, 118. 35
Add 25% of (bulk sale price) $12,263.84 claim	3, 065. 96
Value resulting from calculation	6, 184. 31

Calculation at 30%

Award (scrap prices)	$4, 157. 80
Less 30% of (scrap price) award	1, 247. 34
	2, 910. 46
Add 30% of (bulk sale price) $12,263.84 claim	3, 679. 15
Value resulting from calculation	6, 589. 61

10. Plaintiff's net sales during the 18 months next preceding the requisition, as shown by his Iowa State retail sales tax returns, amounted to about $23,000, and in operating his business he generally had a fairly complete stock turn-over about every seven or eight months. On the basis of his stock being worth, in bulk, approximately two-thirds of the net prices at which he sold it and a complete stock turn-over about every seven or eight months, his stock on hand at the time of the requisition would have a value of about $6,000 to $6,500.

11. Fair and just compensation to plaintiff for the property requisitioned and taken from him by the defendant would be $6,250. He has been paid $2,078.90.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff operated an automobile "graveyard" at Clinton, Iowa. He bought old or wrecked cars and placed

them on his several acres of land. His purpose was to obtain from them usable parts which he could sell at retail, and to sell for scrap the hulks of the cars including such parts as he did not succeed in retailing for further use. In June of 1942 the plaintiff had 177 cars or trucks, or the hulks of them, on his premises. There being at that time a great need for scrap steel, as well as for non-ferrous metals such as aluminum, copper, and brass, for war production, the Government tried to get a great deal of the metal, which was in the thousands of automobile graveyards throughout the country, moved to the steel and other metal producing plants.

The Act of October 16, 1941, 55 Stat. 742, authorized the President to requisition, *inter alia*, "materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions * * * needed for the defense of the United States." Correspondence, quoted in findings 3 and 4, between the plaintiff and the War Production Board, which was acting for the President, shows that the Board attempted to get the plaintiff to sell the contents of his yard at scrap or junk prices. The plaintiff, asserting that such prices would not include the value of usable parts which the plaintiff expected to get from the cars in his yard, refused, and, on June 17, 1942 the Government requisitioned and caused to be taken away all the cars, trucks, parts, tires and tubes in the plaintiff's yard and buildings. The materials were weighed and the plaintiff was offered $4,157.80 which was the right price of the materials as scrap. He refused to settle for this amount, and, under the terms of the requisition statute, accepted one-half the amount, or $2,078.90, without prejudice to his right to recover more, if he was entitled to it, in this court.

We think the Government's offer to pay only scrap prices for the plaintiff's materials was too low. If they were worth no more than that, there would be no point in any automobile graveyard enterprise, since the scrap value could be obtained immediately upon the automobiles being brought into the yard. There are thousands of these enterprises in the country, and have been for many years, so there must be a profit to be made by detaching and selling, for further

use, parts, including tires and tubes, from old and wrecked cars. The plaintiff is, therefore, entitled to more than he was offered.

The question of how much the plaintiff's stock was worth is difficult, and cannot be determined with much precision. The plaintiff made an inventory at the time the Government was taking the materials away, in which he listed all the parts, of the kind usually saleable, whether they were still incorporated in a hulk of a car, were lying in or under or beside it, where they had been placed when other parts were taken from the car, or had been laid away in a shed, as some parts of kinds most sensitive to the weather, such as motors and generators, and tires and tubes, had been. He valued each part at its retail sale price as a used part, then discounted the totals for tires and tubes by 20 percent, and the totals for other parts by 33⅓ percent, the discount being on the theory that the Government's bulk requisition relieved him of the necessity of retail handling, and hence the price should be a bulk sale price. The total given by the plaintiff's figures is $12,263.84. The prices of individual parts shown in the plaintiff's inventory are approximately correct in the sense that if a customer came along who happened to need and want to buy any one of the parts, that would have been the price he would have paid. But we do not think the plaintiff had any reasonable prospect of selling at retail more than a fraction of the potentially saleable parts in his yard. As we understand the automobile graveyard business, the customers' wants are highly particularized. For example, his 1933 Chevrolet has a cracked cylinder head. He could buy a new one, but its cost would be large in comparison with the value of his car, so he may go to an auto graveyard to see if he can get one there. There might be one or several 1933 Chevrolets there, and one or more of them might have a usable cylinder head. If so, a sale will result. But every sale is, to a considerable extent, a chance meeting of a highly particularized demand, out of a supply which must be of considerable variety if it is to have any prospect of meeting such a demand. From any particular car in stock, only a few out of the many potentially saleable parts may ever be asked for by customers. The result, as we

understand it, is that a large proportion of the potential supply must ultimately go for scrap, as the models in the yard become older and fewer cars of the kind that might need such parts are running.

We think, therefore, that the plaintiff's asserted values which are based, in general, on an assumption that every potentially saleable part would have been sold, are far too high. We have, on the basis of the highly conflicting testimony, come to the conclusion that, considering the plaintiff's stock of tires and tubes as well as his stock of potentially saleable parts, and the four cars that were potentially saleable intact, he had a reasonable prospect of re-selling for further use about one-fourth of his inventory. We therefore think he should have been paid $6,250. He was offered $4,157.80 and was paid $2,078.90. He may recover $4,171.10, with interest at 4 percent per annum, as a part of just compensation, from June 17, 1942.

It is so ordered.

WHITAKER, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

S. A. REGENOLD, ADMINISRATOR, C. T. A. OF THE ESTATE OF ELIZABETH A. WILSON, v. THE UNITED STATES

[No. 45762. Decided June 4, 1945]

On the Proofs

Income tax; gross income; exclusions; income from dower interest.—Under the authority of *Brooks* v. *United States*, 79 C. Cls. 470, and *Irwin* v. *Gavil*, 268 U. S. 161, it is *held* that a widow's one-third share of the rental proceeds of properties in which she held a dower interest is taxable income to the widow and that she is not entitled first to recover the value of such life interest as ascertained for estate tax purposes, before liability to tax on the income derived therefrom.

The Reporter's statement of the case:

Mr. Scott P. Crampton for the plaintiff. *Mr. George E. H. Goodner* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Elizabeth A. Wilson, an individual residing at Wilson, Arkansas, died on June 15, 1943, at the age of eighty years, having been born March 18, 1863. She was the widow of R. E. Lee Wilson, who died testate on September 27, 1933.

2. The present plaintiff is the duly appointed administrator, with will annexed, of the estate of Elizabeth A. Wilson, hereinafter referred to as the decedent. On December 15, 1943, the administrator was substituted as the party plaintiff.

3. On or before March 15, 1935, the decedent filed with the collector for the District of Arkansas an income tax return for the year 1934. That return disclosed no net income and no tax liability.

4. On or before March 15, 1936, decedent filed with the collector for the District of Arkansas an income tax return for the year 1935. That return disclosed taxable net income of $11,116.36 and a tax liability of $406.28. That tax was paid as follows:

March 15, 1936	$104.57
April 15, 1936	104.57
June 15, 1936	104.57
December 15, 1936	92.57
Total	406.28

5. On or before March 15, 1937, decedent filed with the collector for the District of Arkansas an income tax return for the year 1936. That return disclosed taxable net income of $39,829.84 and a tax liability of $6,380.35. That tax was paid as follows:

March 12, 1937	$1,595.09
June 15, 1937	1,595.09
September 15, 1937	1,595.09
December 15, 1937	1,595.09
Total	6,380.36

6. The Commissioner of Internal Revenue examined the returns referred to above and determined the net income to be as follows:

Year:	*Net income*
1934	$6,174.12
1935	16,356.22
1936	39,829.84

7. Based on the foregoing amounts of net income the Commissioner determined deficiencies in tax for the years 1934 and 1935, which deficiencies with interest were paid as follows:

Year	Deficiencies	Interest	Date paid
1934	$50.88	$5.25	December 11, 1936.
1935	622.16	26.83	December 11, 1936.

8. R. E. Lee Wilson made no provision in his will for his widow, Elizabeth A. Wilson, and left only nominal amounts to his three children. After his death, his three children and other beneficiaries named in the will instituted proceedings in the Circuit Court of Osceola District of Mississippi County, Arkansas, to contest the will, Elizabeth A. Wilson being named the defendant. However, before a trial and decision of the case, a settlement was agreed upon and signed by the plaintiffs in that case which was later approved by the court. Elizabeth A. Wilson did not sign that agreement. The agreement was made subject to Elizabeth A. Wilson's dower interest in the real estate owned by R. E. Lee Wilson at the time of his death and located in Arkansas. That real estate consisted of five pieces of property more particularly described in the next finding.

9. In the settlement of the Federal estate tax liability of decedent's husband, the Commissioner determined that the fair market value of the decedent's (widow's) life interest in one-third of each of four of the five properties (referred

to in the preceding finding) at the time of her husband's death was as follows:

Name of Real Estate:	Value of interest
School District No. 25 Property	$7,267.50
Luxora School District Property	4,974.31
Hot Springs Property	1,205.22
Rufus Lawrence Property	1,426.67
Total	14,873.70

The fifth property, the Boy Scouts of America Property, produced no income. None of these properties was ever occupied by the decedent as a homestead.

10. The foregoing values of decedent's interest in those properties were based on her life expectancy of eight years as of the date of her husband's death and her expected income from the properties. There has been no change in these figures by either party since the agreement to them for estate tax purposes. The properties designated in finding 9 as School District No. 25 Property, Luxora School District Property and Rufus Lawrence Property were farm lands, and the Hot Springs Property was residential property. All of those four properties were rented and the decedent's income therefrom consisted of one-third of the rental proceeds after the necessary expenses were deducted. The rentals of these properties were handled through the office of Lee Wilson & Company, the amounts of rentals were collected by that office and decedent's share was either paid to her or credited to her account.

11. In 1933 decedent received no dower income from her husband's properties. In 1934, 1935, and 1936, the dower income received by her from these properties was as follows:

Property	1934	1935	1936
School District No. 25 Property	$1,352.67	$5,961.28	$2,954.47
Luxora School District Property	114.60	1,122.88	4,333.51
Hot Springs Property	(69.23)	89.50	2.05
Rufus Lawrence Property		282.66	282.66
Totals	$1,398.04	$7,456.32	$7,572.69

In arriving at the net income on which the taxes assessed against decedent were computed, the Commissioner included these total amounts as taxable income received from those properties in the respective years.

12. The decedent filed timely claims for refund of the tax and interest which were paid for the foregoing taxable years. Those claims were based on the ground that the Commissioner had overstated the decedent's taxable income for each of the respective years by including therein the respective amounts received by decedent as payment of her dower interest.

The Commissioner rejected those claims in full by registered letter dated October 4, 1940, and no part of the amount so claimed has been refunded either to the decedent or to recover.

The court decided that the plaintiff was not entitled to recover

Whitaker, *Judge*, delivered the opinion of the court:

The question presented in this case is whether or not the income received by Elizabeth A. Wilson from her dower interest in the estate of her husband R. E. Lee Wilson is taxable to her as income.

R. E. Lee Wilson died on September 27, 1933, seized and possessed of five parcels of real estate. From four of these parcels his widow received rent in the year 1934 in the amount of $1,398.04, in the year 1935, $7,456.32, and in the year 1936, $7,572.69. These sums were included within her gross income. This is alleged to have been erroneous.

When R. E. Lee Wilson died the value of his widow's dower interest in the real estate of which he died seized and possessed was fixed at $14,873.70. Plaintiff contends that the widow's estate is entitled to recover this value before the income from the property is taxable to it. This we think is erroneous.

What the widow got on the death of her husband was a life estate in one-third of the real estate of which he died seized and possessed. Under section 22 (b) (3) of the Revenue Act of 1934 (48 Stat. 680, 687), and a similar section of

the Revenue Act of 1936 (49 Stat. 1648, 1657), the value of this interest is not income to the recipient in the year in which it was received, but under these sections "the income from such property shall be included in gross income." The value of Mrs. Wilson's dower interest was not included in her income in the year in which it was received; it is the income from this interest which has been included in her income. This seems to be clearly in accordance with the provisions of the Acts.

In *Ronald L. Tree, et al.* v. *United States*, 102 C. Cls. 128 (55 F. Supp. 438), it was conceded that if the income included in plaintiff's gross income had been income from her dower interest in her deceased husband's estate it would have been taxable to her. This concession was made necessary not only by the provisions of the Act, but also by our decision in *Brooks* v. *United States*, 79 C. Cls. 470 (6 F. Supp. 844), and by the decision of the Supreme Court in *Irwin* v. *Gavil*, 268 U. S. 161.

In *Brooks* v. *United States*, *supra*, the plaintiff insisted that he had the right to recover the value of his life estate in a trust fund created by the will of his grandmother before he was taxable on the income therefrom. This contention was rejected by us on the authority of *Irwin* v. *Gavit*, *supra*, and other cases.

In *Irwin* v. *Gavit*, *supra*, the plaintiff insisted that he was not taxable on the income which he was entitled to receive from a trust estate created by his mother-in-law, a portion of the income from which he was entitled to receive over a period not to exceed 15 years. The court rejected that contention, saying:

> * * * The language quoted leaves no doubt in our minds that if a fund were given to trustees for A for life with remainder over, the income received by the trustees and paid over to A would be income of A under the statute. It seems to us hardly less clear that even if there were a specific provision that A should have no interest in the corpus, the payments would be income none the less, within the meaning of the statute and the Constitution, and by popular speech. In the first case it

> is true that the bequest might be said to be of the corpus for life, in the second it might be said to be of the income. But we think that the provision of the act that exempts bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income properly so-called simply because of a severance between it and the principal fund. No such conclusion can be drawn from *Eisner* v. *Macomber*, 252 U. S. 189, 206, 207. The money was income in the hands of the trustees and we know of nothing in the law that prevented its being paid and received as income by the donee.

Under the authority of the cases cited, we must hold that plaintiff's part of the income from the property in which Elizabeth A. Wilson had a dower interest was properly included in her gross income.

Plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

HARRY KAUFMAN, INCORPORATED v. THE UNITED STATES

[No. 44395. Decided June 4, 1945]

On the Proofs

Increased costs to merchant-contractor due to enactment of National Industrial Recovery Act.—Plaintiff, a wholesale and retail dealer, not a manufacturer, entered into a contract with the Government, in 1933, to furnish certain items in the amount and at the time the items might be requested by the Government; plaintiff's bid prices being based on prices quoted to it by manufacturers before their prices were raised as the result of the enactment of the National Industrial Recovery Act. It was *held* that the effect of wage fluctuations was not necessarily reflected precisely in the selling prices, but upon the testimony of a business man familiar with market transactions, it was concluded that the increases in prices were due to the enactment of the National Industrial Recovery Act, and plaintiff is entitled to recover under the provisions of the Act of June 25, 1938. (52 Stat. 1197.)

Same; burden of proof.—In the instant case, involving a disputed increase in cost of materials, it is *held* that the burden of proof by a preponderance of evidence has been met by the plaintiff. *Phillips* v. *United States*, 102 C. Cls. 446, distinguished.

Same; fair and equitable compensation under Act of June 25, 1938.—Where the evidence is not sufficient to measure exactly the increased costs due to the enactment of the National Industrial Recovery Act, all the evidence is taken under consideration and a jury verdict is arrived at to give the plaintiff fair and equitable compensation under the Act of June 25, 1938.

The Reporter's statement of the case:

Mr. Maurice H. Thatcher for the plaintiff. *Mr. Fred B. Rhodes* was on the briefs.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is, and was, during the period hereinafter mentioned, a wholesale and retail dealer located in Washington, D. C. During the years 1933 and 1934 it purchased goods and supplies from time to time from jobbers and manufacturers for resale, and did not manufacture.

2. For the fiscal year ending June 30, 1934, the Treasury Department advertised for bids for furnishing to the United States Government and the District of Columbia certain supplies embraced in the General Schedule of Supplies of the General Supply Committee, Treasury Department.

That part of the general schedule involved in this suit was divided into classes as follows:

> Class 27—Dry Goods; Textiles; Bedding; Buttons; Curtains; Cushions; Draperies; Findings; Floor Coverings; Linoleum; Notions; Oilcloth; Trimmings; Upholstery Materials; Yarns; etc.
>
> Class 37—Athletic equipment; Recreational apparatus; Sporting goods; Special Wearing apparel.
>
> Class 55—Textile clothing; Knitted goods.
>
> Class 72—Boots; Shoes; Leather and Rubber Clothing.
>
> Class 73—Caps; Hats; Gloves; Men's and Women's Furnishings.

Reporter's Statement of the Case

The dates of the issuance of advertisements, and the dates that the resulting bids were opened, were by classes as follows:

Class:	*Advertised*	*Bids opened*
27	Jan. 18, 1933	Feb. 17, 1933
37	Jan. 4, 1933	Feb. 1, 1933
55	Jan. 4, 1933	Feb. 1, 1933
72	Jan. 4, 1933	Feb. 1, 1933
73	Jan. 4, 1933	Feb. 1, 1933

3. With its bid the plaintiff furnished bond to accept the contract on any item awarded. The plaintiff was the successful bidder on certain of the articles in these classes, and was awarded the contract therefor. The date of award does not appear.

Formal contract, pursuant to plaintiff's accepted bid, was entered into July 1, 1933, the first day of the fiscal year 1934. The consideration named was the unit price stated in the general schedule attached to the contract, and deliveries were to be made within the time stated in the schedule after receipt of order from the particular department or establishment submitting the order.

The contract with its schedule is in evidence and made part hereof by reference.

4. The parties to the contract have performed their mutual obligations and this suit is brought under the act approved June 25, 1938, Public, No. 741—75th Congress, Chapter 699—3rd Session, S. 3628, 52 Stat. 1197, giving this Court jurisdiction to hear and render judgment upon claims of Government contractors for increased costs incurred as a result of enactment of the National Industrial Recovery Act.

5. In bidding on these supplies plaintiff used prices that information it had or procured indicated it could buy them for during the fiscal year 1934, and on sale to the Government, under the supply contract, make a reasonable profit.

The plaintiff had no firm or binding contracts from its prospective suppliers as to prices, before it made its bid to the Government. The prices furnished the plaintiff were merely quotations.

On some of the supplies the plaintiff made a profit, and these supplies are excluded from its claim herein. On other supplies the plaintiff incurred a loss, due to a rise in price

from the time of its bid, to the time it purchased them to fulfill the supply contract, a rise that brought the price to a higher level than stipulated in the supply contract.

6. As a result of the enactment of the National Industrial Recovery Act the plaintiff incurred increased costs of the supplies furnished the Government under its contract therewith. This increase in cost is not capable of exact ascertainment. Taking all the evidence and circumstances into consideration to arrive at a fair and reasonable amount in the manner of a jury, it is found that the increased costs amounted to $4,000.00. This sum includes no increase in overhead, profit or transportation charges, and is confined to items upon which the plaintiff sustained a loss.

7. December 27, 1934, the plaintiff filed with the General Supply Committee, Treasury Department, a claim for the sum here sued for, presenting it on the form provided by the defendant "for presentation of claim for relief, under Public Act 369, approved June 16, 1934, of Government contractors whose costs of performance were increased as a result of compliance with the Act approved June 16, 1933."

Additional evidence on the claim was furnished by the plaintiff to the supply committee November 26, 1935.

The claim has not been paid in whole or in part.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff is a wholesale and retail dealer, purchasing goods from jobbers and manufacturers and reselling them. Its activities are confined to merchandizing. It does not manufacture. It is suing here for increased costs incurred as a result of enactment of the National Industrial Recovery Act, as authorized by the act approved June 25, 1938, 52 Stat. 1197, giving this court jurisdiction to hear and render judgment upon claims of Government contractors.

The plaintiff here was such a contractor.

In response to an invitation it submitted certain bids to the Treasury Department. Four of them were opened February 1, 1933, and one February 17, 1933. The business solicited by the plaintiff was the furnishing of some of the items for

the fiscal year ending June 30, 1934, enumerated by classes in the well-known General Schedule of Supplies of the General Supply Committee, Treasury Department. The plaintiff with its bids furnished bond to accept the contract on any item awarded. It was the successful bidder on certain items, and as to these items, pursuant to the terms of its bid and bid-bond, it entered into a formal contract with the defendant July 1, 1933, to supply them.

The General Supply Schedule is printed and distributed. It bears the name of each contractor and the unit contract price against particular items. By reference to it a Government agency desiring an article may at any time during the fiscal year order it of the contractor named in the schedule and the contractor furnishes it at the agreed price, also named in the schedule.

Under this agreement Government agencies might call upon the plaintiff for large or small quantities, or none at all.

With this method of doing business, quantities and dates of delivery not being predetermined, the plaintiff did not make firm contracts in advance with manufacturers or jobbers. The plaintiff of course did not know what quantities the Government, in the course of the fiscal year, would demand, or when. What the plaintiff did in preparing its bid, was to rely on prices quoted to it by manufacturers or jobbers. These quotations were necessarily given before the opening of bids February 1 and 17, 1933, and the contract price, based on such quotations, was applicable for one year beginning July 1, 1933. There was thus a five-month period from quotation to the beginning of the contract period, and nearly a year and a half to the end of the contract period. The plaintiff, being bonded to accept the award, could not thereafter withdraw its bid.

There was an increase in prices from those quoted to the plaintiff in or before February, 1933, to those paid by the plaintiff to fulfill the supply contract. So much of that increase as was a result of enactment of the National Industrial Recovery Act, except as to items on which there was

a profit, plaintiff here seeks to recover under the act of June 25, 1938. No labor performed by the plaintiff is involved.

It is to be noted that the plaintiff was a merchant, and that the goods it purchased and sold had already gone through manufacturing processes. The national industrial recovery program endeavored to and did reverse the downward trend of wages, with the natural result that materials on which labor was expended, that is to say manufactured goods, tended to increase in price, as wages increased. This was of course true with respect to goods already manufactured, as well as those in the process of manufacture.

The effect of wage fluctuations on the price of goods passing through the hands of many skilled wage-earning operatives, may be considerable. But it does not necessarily follow that a wage increase is precisely reflected in the selling price. There are too many influences present in arriving at a price agreeable to vendor and vendee for anyone to say that a specific wage increases is fully incorporated in the negotiated price.

In the background of vendor and vendee, as they sit across the table dickering on a price, stand competitors, tax assessors, manufacturers, jobbers, market reporters, the ever-present supply and demand, the relative strength in the market of the negotiators, and other factors familiar to the business world. So that as a matter of practical application it is impossible to segregate any exact part of an increase in the price of goods and definitely and finally say that that exact amount is the result of enactment of the National Industrial Recovery Act.

But it is manifest that Congress had in mind the existence of such increases in the price of material, the result of enactment of the National Industrial Recovery Act, for Congress provided for their recovery. The Congress recognized the situation as having actuality, and in the case of Government contractors, deserving remedial measures.

In the case of *Phillips* v. *United States*, 102 C. Cls. 446, a case arising under the same act as here, it was said that the

burden of proof was always on the plaintiff to establish his case by a "preponderance of evidence." This was said with reference to labor costs, which the court did not allow in judgment because that burden had not been met.

But in the case we have here, involving a disputed increase in cost of materials, we think that the burden of proof by a preponderance of the evidence has been met. The plaintiff's principal witness, a highly-placed officer of the plaintiff corporation, testified to the effect that the increase was the result of enactment of the National Industrial Recovery Act, and he was especially qualified to testify on that point because he was not only directly involved in the buying and selling of the goods in question, but he had had a generation of experience, going in and out of and circulating within the market. A business man of that experience is entitled to be heard, and his testimony calls for rebuttal at the same level, which the defendant did not undertake to offer. There was one witness only for the defendant, an accountant, who expressly disqualified himself to testify as to whether the "N. R. A." increased or decreased the cost of the goods. He was not an expert on market affairs. It is manifest that the books of account would not disclose the increases that are here in issue, and he frankly stated his inability to discover them. His testimony is to be evaluated on an accounting basis and is not to be accepted on matters outside his qualifications.

The plaintiff has suffered a loss due to the increase in cost attributable to the National Industrial Recovery Act for which he should be compensated.

The evidence is not sufficient to measure that loss exactly. However, taking all the evidence into consideration and acting as a jury of reasonable men would act under the circumstances, we think the plaintiff would be fairly and equitably compensated by the award of $4,000.00.

A judgment for $4,000.00 will be entered for the plaintiff.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

EUGENE P. HARRIS v. THE UNITED STATES

[No. 45807. Decided December 4, 1944]

On the Proofs

Pay and allowances; U. S. Navy Surgeon; dependent mother.—Following the decisions in *Freeland* v. *United States*, 74 C. Cls. 471; *Scheibel* v. *United States*, 93 C. Cls. 480, and *Abramson* v. *United States*, 97 C. Cls. 706, upon the undisputed facts showing conclusively that plaintiff's mother is dependent upon him for her chief support, it is *held* that plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Mr. Fred W. Shields* and *King & King* were on the brief.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, on January 15, 1937, accepted appointment as ad interim Assistant Surgeon in the United States Navy with rank of lieutenant (j. g.) from January 4, 1937; on March 10, 1937, he was commissioned as regular Assistant Surgeon with rank of lieutenant (j. g.) from January 4, 1937; on October 8, 1941, he was commissioned regular Passed Assistant Surgeon, with rank of lieutenant from April 1, 1941; and on November 14, 1942, he was commissioned as Surgeon, with rank of lieutenant commander from October 1, 1942, for temporary service. He is a bachelor officer.

2. Plaintiff's father died on November 9, 1930. The only property left by him was the stock of goods in a drug store which he operated prior to the time of his death, and approximately $8,940 in insurance, all of which was left to his widow, plaintiff's mother, except $1,000 which was paid to the plaintiff.

3. After the death of her husband plaintiff's mother traded the drug-store stock for a small cottage in Waco, Texas, which was subject to a mortgage of $800. She paid off the mortgage with a part of the insurance money left to her by

her late husband, and invested the remainder in various securities. She then attended college so that she could qualify as a teacher, and after graduating she obtained employment as a teacher and taught in various schools for seven years, or until June 1940, when she was forced to relinquish her employment on account of advancing age and ill health. She is now 68 years of age, and has held no gainful employment since June 1940. While attending college and teaching school she sold from time to time the securities which she had purchased with the insurance left by her husband, in order to defray the living and school expenses of herself and her two children, and by 1940 she had sold all her securities.

4. Plaintiff's mother has one child, besides the plaintiff, a daughter, Janice, who is employed as a school teacher at a monthly salary of $115, but she actually receives only $93.75, the balance being withheld for retirement fund, deductions, etc.

The mother taught school until the close of the 1939–40 school year, and then moved to Blessing, Texas, where her daughter was then teaching. She and her daughter lived together at Blessing, Texas, until September 1941, when they moved to Corpus Christi, Texas, where they have since resided in a small apartment. Their joint average monthly living expenses amount to from about $130 to $144, and include the following items: Rent, including gas and electricity, $55; food, $50 to $60; part-time maid, $7; telephone, $2.48; magazines and papers, $2; maintenance of car, $8 to $12; and incidental expenses about $6. Slightly more than half of these expenses are attributable to the mother.

In addition to her share of the joint household expenses the mother spends about $10 a month for clothes and shoes; $15 a month for medical and dental expenses; $6 for cleaning and laundry; $3 for charities and church contributions; and about $5 for incidental expenses. In addition it was necessary for her to employ a full-time maid for about five months at $25 a month, in lieu of a part-time maid, during a recent illness. Their expenses while living in Blessing,

Texas, from June 1940 to September 1941, were substantially the same as their expenses at Corpus Christi, Texas.

5. The mother and daughter follow no fixed plan in paying their joint and personal living expenses; the monthly bills are paid by either or both of them as occasion arises. As a practical matter each is supposed to pay approximately half of the joint household expenses.

6. Since June 1940, the mother has owned no income-producing personal property, and the only real property owned by her is the cottage at Waco, Texas. This property she has been unable to sell, but she did rent it for a considerable period of time for $10 a month, which sum was sufficient to pay taxes, insurance and ordinary costs of maintenance on it. In 1940 it became necesary to repair it so she placed a mortgage of $542 on it to defray the cost of the repairs; since that time it has been rented for $18 a month. The rental thus received was used to pay taxes, maintenance, and principal and interest on the mortgage until April 1943, when the mortgage was paid in full, and she, since that time, has received a net income of approximately $8 a month from the property.

7. The plaintiff allotted $75 of his monthly pay to his mother, commencing in June 1940, which allotment was increased to $100 a month, commencing in March 1943. He also contributed $200 in cash to his mother in September 1943, and has made other contributions to her from time to time when she needed additional assistance. The plaintiff's contributions, with the income from the cottage, have been the mother's only source of income since June 1940.

8. According to a computation by the General Accounting Office, the difference between the amount plaintiff has been receiving as rental and subsistence allowances for an officer, without dependents, and the rental and subsistence allowances of an officer of his rank and length of service, with dependents, for the period from June 1, 1940, to September 30, 1942, is $1,163.40.

Plaintiff's claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

Per Curiam: The facts in this case are not in dispute and show conclusively that plaintiff's mother is dependent upon him for her chief support. Plaintiff is entitled to recover. *Freeland* v. *United States*, 74 C. Cls. 471; *Scheibel* v. *United States*, 93 C. Cls. 480; and *Abramson* v. *United States*, 97 C. Cls. 706.

Entry of judgment will be suspended awaiting the filing of a report from the General Accounting Office as to the amount due in accordance with the foregoing findings of fact and this opinion. It is so ordered.

Upon a report from the General Accounting Office showing that, in accordance with the court's opinion, there was due to the plaintiff the sum of $2,639.00, and upon plaintiff's motion for judgment, it was ordered October 1, 1945, that judgment be entered for the plaintiff in the sum of $2,639.00.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION v. THE UNITED STATES

[No. 43809. Decided May 7, 1945. Defendant's motion for new trial overruled October 1, 1945]*

On the Proofs

Government contract; claims for work, wages and short payment.—Where plaintiff entered into a contract with the Government to construct 16 officers' quarters at Fort Sam Houston, Texas; and where plaintiff presented claims for the alleged extra expense involved in securing spiral and upright reinforcements, for an increase in the union wages, for an increase in lumber prices, for a short payment on footing depths, and for recovery of liquidated damages withheld; it is *held* that the method of securing the reenforcements was optional and the plaintiff failed to prove that any extra expense was involved in placing them. Reimbursement for the increase in wages should have been made since the contract specifically provided for such a contingency, and plaintiff is entitled to recover the difference. The increase in lumber prices should have been anticipated by plaintiff and recovery for this item is denied.

*Defendant's petition for writ of certiorari granted March 4, 1946.

Same; inconsistent provisions in contract.—Where the two provisions of the contract relating to footing depths were inconsistent; it is *held* that the provision allowing price adjustments for both additions and deductions in the work was the clause that should prevail.

Same; delays; liquidated damages.—The delays that occurred were the fault of the Government, which had prevented plaintiff from performing excavation work when necessary. However, plaintiff failed to notify the contracting officer of the cause of the delay so that an extension of time could be granted, and plaintiff is not entitled to recover liquidated damages withheld.

The Reporter's statement of the case:

Mr. Norman B. Frost for the plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Joseph A. Holpuch Company, plaintiff herein, is a corporation of the State of Illinois, chartered to engage in the general building construction business.

2. On November 29, 1933, the plaintiff entered into a contract with the defendant, represented by P. W. Guiney, Brig. General, Q. M. C., Chief, Construction Division, as contracting officer, whereby, for a consideration of $178,120, the plaintiff as contractor agreed to furnish all labor and materials, and perform all work required for the construction of 16 company officers' quarters (two-story type), Fort Sam Houston, Texas, in accordance with specifications, schedules and drawings made a part of the contract. The contract was numbered W 6278 q m 115, and was on Government form P. W. A. 51 as a Federal Emergency Administration of Public Works project.

By the contract the work was to be commenced December 18, 1933, and be completed September 24, 1934, a period of 280 calendar days.

The contract, specifications, schedules and drawings are in evidence and made part hereof by reference.

Article 15 of the contract provided:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contract-

ing officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Article G. C. 10 of the specifications provided:

Interpretation of contract: Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. [meaning the defendant's constructing quartermaster] shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

Article 5 of the contract provided:

Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article G. C. 27 of the specifications provided:

Extras: No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M., and the price stated in such order.

3. *Spiral spacers*, $184.80.

Reinforcing steel in concrete foundation piers was specified by the contract. It consisted of a circle of six parallel vertical rods, their surfaces deformed for binding effect, and a spiral encircling them, to which the rods were attached at regular intervals. With regard to this reinforcement Article 24 of the specifications provided:

Placing: Metal reinforcements shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suit-

able clips at intersections, and shall be supported by concrete or metal chairs or spacers, or metal hangers.

Article 36 thereof provided with respect to pouring of the concrete, that before pouring reinforcement should be thoroughly secured in position and approved by the constructing quartermaster.

Article 38 provided:

> *Compacting:* Concrete during and immediately after depositing, shall be thoroughly compacted by means of suitable tools. The concrete shall be thoroughly worked around the reinforcement and around embedded fixtures, and into the corner of the forms.

The reinforcement required by the specifications was designed to constitute a structure within itself, of such rigidity as to withstand the displacing action of the pouring and puddling of concrete. This structure was fabricated in twenty-foot sections, before being lowered into the form for the pier. This form was a steel casing of the proper diameter and so equipped that it could be pulled after the concrete was poured. A tremie was used in the pouring. The reinforcing structure was "supported by concrete or metal chairs or spacers, or metal hangers," to keep it the proper distance from the surface of the concrete, in this case about two inches. There is no controversy over the requirement or fulfillment of this specification, immediately quoted above.

The provision that "metal reinforcement shall be accurately positioned and secured against displacement by using annealed wire of not less than No. 18 gauge, or suitable clips at intersections," had reference to the tying of spiral and vertical rods together at their intersections.

It was possible to secure rods and spiral at their intersections firmly with No. 18 annealed wire.

The parties' officers at the site were disagreed as to the interpretation of Article 24 of the specifications, plaintiff taking the position that the spiral might be held at its intersections with the vertical rods by annealed wire, defendant taking the position that so-called "spiral spacers," having the sole function of maintaining regularity in the spiral turns, were required. The plaintiff ultimately furnished and used

in the reinforcement structure a spiral spacer in the form of a light, vertical channel in which at the requisite distances lugs had been punched, and in the fabrication of the structure the lugs were forced around the spiral rod holding it rigidly in place. There were two such channels used for spiral spacing, placed on opposite sides of the spiral. The reinforcing rods were six in number and were kept in place by annealed wire binding them to the spiral at selected intersections. By using the spiral spacer it was not necessary to tie the reinforcing rods at every intersection with the spiral rod, and it was not done.

No order was issued by the contracting officer requiring the use of a spiral spacer.

A spiral spacer was commonly used in such structures and was more practical than annealed wire.

January 9, 1935, the plaintiff submitted to the constructing quartermaster a claim for extra compensation for the use of spiral spacers in the amount of $184.80, on which there appears to have been no action.

Accurate placing and securing of the spiral without the use of à spiral spacer would have been an expense to the plaintiff which under the circumstances it did not incur.

There is no proof of the final extra expense, if any, that plaintiff was put to, by reason of using a spiral spacer.

4. *Bricklayers' wages*, $1,036.61.

Article 18 of the contract, insofar as may here be pertinent, provided as follows:

> *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:
>
> Skilled labor____ $1.00
> Unskilled labor______________________________________ .40
>
> * * * * *
>
> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above,

such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

* * * * *

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works, in connection with another project for Army construction at San Antonio, Texas, to which plaintiff was not a party, formally ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour, retroactively to February 2, 1934.

This decision was transmitted to the plaintiff by the constructing quartermaster March 20, 1934.

March 23, 1934, the constructing quartermaster advised plaintiff that all bricklayers employed on the project here in suit "will be paid at the rate of $1.25 per hour."

The plaintiff replied to this March 29, 1934, stating that it would be governed accordingly but under protest, and expected reimbursement of the difference of 25 cents per hour when the ultimate amount was ascertained.

On May 12, 1934, the constructing quartermaster advised the plaintiff that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity should be paid $1.25 per hour, retroactive to February 2, 1934, and that plaintiff would be within its "rights to file appeal with the

Board of Labor Review from the decision of the contracting officer."

On July 16, 1934, the constructing quartermaster transmitted to the plaintiff copy of an undated decision by the Assistant Secretary of War in another case that the War Department could not review the decisions of the Board of Labor Review.

The bricklayers were paid $1.25 per hour accordingly, instead of $1.00. The hours of labor amounted to 3,286½. At 25 cents an hour this amounts to $821.63. With 10 percent thereof for overhead and 10 percent of the aggregate for profit, this is increased to $994.17.

The issue as to whether bricklayers on the contract work here in suit should be paid $1.25 per hour or less was not submitted to the Board of Labor Review. The plaintiff has not been paid the said sum of $994.17, or any part thereof.

5. *Increase in lumber prices*, $2,704.20.

Article 7 (c) of the contract provided:

> *N. R. A. materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

The Code of Fair Competition for the lumber and timber products industry was approved by the President August 19, 1933, and went into effect August 29, 1933.

The plaintiff signed the President's Reemployment Agreement August 25, 1933, under the National Industrial Recovery Act.

On October 20, 1933, the Edward Hines Lumber Company furnished the plaintiff a quotation of unit prices on the kind of lumber called for under plaintiff's contract, "subject to change or previous sale without notice." The plaintiff based its bid on this quotation.

On October 30, 1933, the Lumber Code Authority published minimum prices on Southern Yellow Pine lumber

(used largely on plaintiff's contract) effective November 9, 1933, which had the effect of increasing prices in Edward Hines Lumber Company's quotation.

Bids were opened in the instant case November 20, 1933.

By the time the plaintiff was ready to purchase the lumber the lumber company would not sell below the minimum prices established by the Code, by that time in effect, and plaintiff had to pay the higher prices.

The amount of this difference is $2,234.88. With ten percent overhead and ten percent profit on the aggregate, this would be increased to $2,704.20.

The plaintiff made no claim to the contracting officer for increased cost of lumber.

6. *Footing depths*, $5,793.19.

Articles 3 and 4 of the specifications provided:

> 3. *Excavation:* Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be deposited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.
>
> Excavations for footings shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.
>
> Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.
>
> All excavations shall be maintained in good order during the progress of the work, and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.
>
> 4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil

> which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring holes, the excavation must be cased with metal casings of ample strength to prevent crushing. Casings may be collapsible or of one length.
>
> Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.
>
> At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechanical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

Paragraph 45 of the specifications provided:

> CONCRETE WORK
>
> * * * * *
>
> 45. *Footings, etc.:* The Contractor shall see that the bottom of all excavations are of undisturbed soil, properly leveled before pouring footings.
>
> Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid. If solid foundation is found at a lesser depth than the dimension given on the drawings, then a credit will be given the U. S., based on the "Unit Prices".
>
> * * * * *

The depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and it was on this depth that plaintiff estimated its bid.

Soil beneath the projected houses was, when wet, shifting and unstable. Experience in the locality had demonstrated that building foundations were unsatisfactory when rested thereon, and that it was desirable for the footings to go below this uncertain soil tò block clay having a good bearing value. The type of footing in use to prevent movement of the foundation in wet weather was a reinforced concrete pier with a bell-shaped bottom resting on block clay, beams from pier to pier at the surface being wedge-shaped to escape the lifting action of the soil.

In the project here involved there were 16 piers to a house with depths from the first floor level ranging from 29 feet to 37.5 feet, with an average of 32.49 feet.

Plaintiff excavated to depths approved by the defendant's inspectors. In making payment under the contract the defendant withheld from the contract price the difference between actual excavation and 37 feet 6 inches, at the unit prices named in the contract. The applicable unit prices were contained in the following clause of the contract:

> The following unit prices shall be used as a basis for making deductions from or additions to the contract price provided any deviation from the drawings and specifications decreases or increases the amount of work indicated or required herein. These prices shall include the furnishing of all labor and material complete in place unless otherwise noted.
>
> * * * * *
>
> (2) Excavation, in piers and bell foundations—$60.00 per cu. yd.
>
> * * * * *
>
> (4) Concrete, Type B, in piers and bell $11.00 per cu. yd.
>
> (5) Reinforcing Steel—$60.00 per ton.
>
> * * * * *

The adjustment made by the defendant was a net deduction of 1,279.47 linear feet, or $6,042.79, based on unit prices of $11 per cubic yard for concrete, $60 per ton for steel, and $60 per cubic yard for excavation, all computed on a pay basis of 37 feet, 6 inches. This deduction was calculated by the constructing quartermaster and applied by the paying officer. On a basis of 33 feet plaintiff's claim to recovery would be correctly stated at $5,793.19.

7. *Liquidated damages withheld*, $1,776.00.

The contract provided:

> The work shall be commenced December 18, 1933, and shall be completed September 24, 1934.
>
> The contractor shall pay to the Government as fixed, agreed and liquidated damages, the amount of Two Dollars ($2.00) per house for each calendar day of delay in the completion of the work herein, beyond the time stated herein for completion, not excusable pursuant to Article 9 hereof.

Article 9 of the contract provided:

Art. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such

appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

The various buildings were accepted by the constructing quartermaster, eight on November 16, 1934, and eight on November 21, 1934, as tendered, a delayed completion of 53 and 58 days, respectively. At $2.00 per day per house the liquidated damages amounted to $1,776.00 and this amount was withheld from the contract price in the last settlement.

After the foundation piers were installed, progress was normal and the assessment and withholding of liquidated damages for delay was solely to cover alleged delay by the plaintiff in installing those piers, more particularly delay in the commencement of excavation for the piers.

The excavation was for cylindrical piers 18 inches in diameter, increased to 4 or 5 feet at the bottom in the shape of a bell, to increase the bearing area.

For structural considerations boring of the hole could not vary from the perpendicular and top and bottom had to center nicely. The bell shape at the bottom of the excavation was cut out with a reaming arrangement lowered into the hole in the final boring. It was possible to excavate the bell shape by hand, but this method, due largely to the confined space, was awkward and inefficient and not ordinarily resorted to.

Excavations of this form were peculiar to areas having the foundation difficulties here present, and the work was a specialty. There were few concerns or individuals equipped and capable of making the necessary excavations.

On November 2, 1933, prior to the date of the contract in suit, the plaintiff had entered into a written agreement with The Excavating and Foundation Company, a Missouri Corporation, hereinafter referred to as the Excavating Company, whereby that company undertook, among other things, to excavate for the pier foundations, identical in all respects to the foundations of the 16 buildings here involved, of 59 similar nearby buildings which it was to construct for the Army under a contract dated November 2, 1933, and which forms the subject matter of plaintiff's suit against the de-

fendant in case docketed No. 43812 in this Court. This is referred to as the "59" contract.

The plaintiff made arrangements to have the Excavating Company do the same work on the 16 buildings involved in the instant case, for convenience referred to as the "16" contract. The particulars of that arrangement do not appear, except that the plaintiff considered it a continuation of the excavating work required by its subcontract with the Excavating Company on the "59" contract. The constructing quartermaster approved the Excavating Company as subcontractor on the "16" contract.

At the time it entered into the excavating agreement on the "59" contract, the Excavating Company was doing identical work on a nearby project (herein referred to as the "S. & W." contract), under the jurisdiction of the same constructing quartermaster in charge of the "16" and "59" contracts. In beginning the "S. & W." contract work the Excavating Company had run into two or three weeks' difficulties due to its own inexperience and lack of appropriate equipment. At the request of the contractor the Excavating Company called in to its assistance one A. H. Beck of San Antonio, Texas, an individual trading as A. H. Beck Foundation Company, hereinafter referred to as the Beck Company, who was experienced and well-equipped, and to whom the Excavating Company sublet half of the "S. & W." contract work. By that time the Excavating Company had perfected its equipment, was operating efficiently, and was prepared to do the work on the "59" contract.

In order to begin work on the "59" contract promptly the Excavating Company had prepared an extra rig, similar to the two it was using on the "S. & W." contract. In excavating, the physical work was done by common labor.

Work on the superstructures was wholly dependent upon the foundations, and plaintiff urged the Excavating Company to get started on the agreed excavation. The constructing quartermaster would not permit the Excavating Company to proceed with the "59" contract until the work it was doing on the "S. & W." contract was completed, nor would he permit the Excavating Company to begin work on

the "16" contract until its work on the "59" contract had been completed. In neither the "16" nor the "59" contract would he permit the Excavating Company to make use of the extra rig, prepared especially for the Holpuch jobs.

The constructing quartermaster insisted that the Beck Company be given the work on the two Holpuch jobs, the "59" and the "16", and, in order to extricate itself from these difficulties, the Excavating Company sublet its entire work on the "59" job to the Beck Company, and the Beck Company in course of time performed it. After extended negotiations the plaintiff sublet the excavating work on the contract in suit, the "16" contract, to the Beck Company May 14, 1934, and the Beck Company in course of time performed it.

The delay for which liquidated damages were assessed and withheld was due solely to the constructing quartermaster's refusal to permit the Excavating Company to proceed with plaintiff's work when the plaintiff called upon it to do so.

This action upon the part of defendant's constructing quartermaster interfered with plaintiff's prosecution of its work, and prevented the plaintiff from completing the work by the agreed time.

The plaintiff did not notify the contracting officer of the cause of the delay in the time, manner, and form required by Article 9 of the contract.

8. The plaintiff appended to its last voucher for payment under the contract a list of the claims here in suit, covered by a note as follows:

> The acceptance of payment on this voucher is without prejudice to the right of the Contractor to submit its claims to the General Accounting Office as itemized on the attached paper.

There is no proof of submission of these claims to the General Accounting Office.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff contracted with the defendant November 29, 1933, to construct 16 company officers' quarters at Fort

Sam Houston, Texas. It was a Federal Emergency Administration of Public Works project.

The work required of the plaintiff construction of the foundations, as well as of the superstructure. Subsurface conditions were of an unstable nature and the contract specified concrete piers for the foundations with reinforcing steel. The reinforcing steel was, as the findings state, a structure within itself, and had to be rigid in order to withstand the displacing action of pouring and puddling of concrete. This reinforcing structure consisted of spirals and uprights and a controversy arose as to the means of securing spiral and upright together in such manner as to assure regularity and rigidity. Defendant's officers insisted that plaintiff was required to use what is termed a "spiral spacer." The plaintiff objected, but furnished and used it. The plaintiff claims extra compensation for having done so, but its claim fails for one reason, if no other. The extra expense entailed is not satisfactory proven. The extra expense, if any, may not have been easy to prove, but the proof must at least give us the obvious offsets, such as the expense of an alternative method of accurately placing and securing the spiral. The spiral did have to be accurately placed and secured by some method. The plaintiff is not entitled to recover on this item.

The matter of bricklayers' wages, which plaintiff paid in excess of that which it had expected to pay, is more difficult of determination.

Bricklayers are skilled laborers and the contract provided that skilled labor should be paid not less than $1.00 an hour, but enough to make their wages just and reasonable, "sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort."

There were further provisions. Wages should not fall short of rates agreed upon between labor unions and employers, prevailing on April 30, 1933.

Article 18 (e) (f) of the contract provided:

> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal

> Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.
>
> (f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

The plaintiff was charged with notice as to the union scale in effect April 30, 1933, for its contract was not entered into until the following November. Plaintiff was safeguarded against a future rise in wages effected by the Federal Emergency Administration of Public Works and the Board of Labor Review, for adjustment of the contract price to meet the increase was mandatory.

While plaintiff's work was in progress the Board of Labor Review ruled that bricklayers' wages on another Government job at San Antonio should be $1.25 an hour. This ruling the constructing quartermaster communicated to the plaintiff, and ordered plaintiff to increase bricklayers' wages to $1.25 an hour accordingly. Plaintiff put the increase into effect, under protest, and gave notice of claim for the difference between the original minimum of $1.00 and the new scale of $1.25.

The plaintiff was informed by the constructing quartermaster that he might appeal to the Board of Labor Review. But it was plainly of no special interest to plaintiff to make such an appeal, for the contract provided an automatic increase in contract price to cover such an increase in wages. Increasing the wages increased the contract price, without further order.

The constructing quartermaster construed the ruling of the Board of Labor Review to apply to the vicinity of San Antonio, and this was a reasonable construction to make, for the wages prevailing in the vicinity were the wages to apply to a contract within that vicinity, and Fort Sam Houston and San Antonio are in the same vicinity.

The ordered increase of 25 cents an hour in the wages increased the contract price under the terms of Article 18 (e) of the contract, and the plaintiff is entitled to recover $821.63. Overhead and profit may not be included. The adjustment in contract price is limited to the consideration of "actual" labor costs.

The next item is an increase in lumber prices due to the fact that one of plaintiff's material men increased the price of lumber over the original quotation. The lumber company increased its prices because of the lumber code, a feature of the national industrial recovery program. But there is no provision in the contract in suit which passes such an increase on to the defendant. And the plaintiff can not of course sue under the act of June 25, 1938, 52 Stat. 1197, for the contracts covered by that act had to be entered into on or before August 10, 1933, and plaintiff's contract was not entered into until November 29, 1933. As a matter of fact the Lumber Code Authority published its code prices October 30, 1933, and in the instant case bids were not opened until November 20, 1933. There is discoverable no legal basis for plaintiff's claim for increase in lumber prices, and the item can not be included in a judgment in plaintiff's favor.

The next item is for an alleged short payment on footing depths.

Pier foundations were required, and the footings were to rest on undisturbed soil. The specifications provided:

> Excavations for footings shall be carried down to the depth and levels shown on the drawings.

The depth of excavations for footings was shown on the drawings as 33 feet from the finished floor of the building.

The specifications went on to provide:

> However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M. [meaning the constructing quartermaster].
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

In spite of the fact that the footing depths were shown on the drawings as 33 feet, and that the excavations were required by the above provision to be carried down to the depths shown on the drawings, deeper if necessary, the specifications in the immediately succeeding section provided:

> For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

Here is an inconsistency. The pay basis was to be, by reference to the drawings, 33 feet, then the pay basis is declared to be 37 feet 6 inches.

It is manifest that the uniformity of depth shown on the drawings, 33 feet, was not expected to be attained for the specifications required the excavation to "extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended."

Thus a variation in depth was clearly contemplated, and indeed the provision that should suitable bearings not be encountered at the levels shown on drawings, they should be carried to such levels as might be necessary and approved by the constructing quartermaster, indisputably confirms the probability of variation. So that the 33-foot depth shown on the drawings was at most merely an average depth.

And it very nearly turned out to be that way, for the average depth finally was 32.49 feet.

It happened that the maximum depth excavated for the foundations was 37 feet 6 inches, the minimum 29 feet. In settlement for the work defendant's officers deducted the unit prices provided for that purpose, for the presumed saving or shortage in excavation between the maximum of 37 feet 6 inches and the minimum of 29 feet, calculated of course on the actual footage.

The plaintiff contends that the pay basis should be 33 feet and not 37 feet 6 inches.

This was not a controversy over what work the contract and its specifications required. It is a question of how the contract price is to be computed. The contract indicates on its face that it is "To be paid by the Finance Officer,

U. S. Army, Fort Sam Houston, Texas." So the responsibility for making correct payment was on the Finance Officer, the paying officer and of course, bonded.

The Finance Officer's payment of the contract price must necessarily have been his own responsibility. The decision of the contracting officer as to the amount thereof would have been advisory, at the most, and there was no appealable decision confronting the plaintiff.

The 33-foot and 37-foot 6-inch provisions are so close together in the wording of the contract they must be read together. The plaintiff had as full a notice of the 37-foot 6-inch provision as it had of the 33-foot and may not say it was misled.

It is impossible to reconcile the two provisions. The 33-foot pay basis is the more logical of the two, for the 33 feet were shown on the drawings and that turned out to be approximately the average, and such a pay basis would involve both deductions and additions to the contract price. The "33 feet" shown on the drawings was not a required minimum, for the actual and accepted minimum depth was 29 feet.

On the other hand, the 37-foot 6-inch pay basis was the actual accepted maximum, and used as a pay basis that meant deductions only from the contract price, no additions whatever.

The two contract provisions do not fit into each other. If one is adopted it must be to the exclusion of the other. There is no ambiguity about either one, taken by itself. But there is this to be said about the 33-foot pay basis—it involved additions to as well as deductions from the contract price when the work was done and the accounts cast up. By using the 37-foot 6-inch pay basis there resulted no additions whatever to the contract price, only deductions, a one-sided proposition, somewhat to plaintiff's discomfiture. It was superfluous to talk about additions to the contract price, if there were to be none.

Logic and reason tip the balance in favor of the 33-foot pay basis, for that basis permits additions as well as deductions, which the other basis does not, and put to the selec-

tion, the 33-foot basis must prevail, to the exclusion of the other.

On the 33-foot basis the recovery would be $5,793.19, and the plaintiff is entitled thereto.

The last item to be considered is the claim of $1,776.00 for liquidated damages alleged to have been improperly withheld. The history of the delay for which liquidated damages were assessed is given in some detail in the findings of fact. They reveal that the constructing quartermaster took things into his own hands, giving precedence to excavating work on other contracts, preventing the plaintiff from getting its own subcontractor working on the project with which we are here concerned. The order in which the excavation was thus required to proceed was for the Government's convenience, and while it may have expedited work on other contracts, its effect was to delay plaintiff's work and was chargeable to the acts of the Government, for which plaintiff was not responsible. The delay was plainly excusable under the terms of Article 9 of the contract, and gave no basis for withholding liquidated damages. There was no administrative finding as to the causes of the delay from which the plaintiff might appeal.

Up to that point the case is all for the plaintiff, but the plaintiff neglected to set in motion its right to remission of liquidated damages, for it did not notify the contracting officer as to the delay as required by Article 9 and thus place upon the contracting officer the duty of investigating the matter, and extending the time for performance. The Government reserved the right to have the contracting officer investigate the matter, if the contractor was to have liquidated damages remitted. Having failed to prepare the necessary foundation for its claim, the plaintiff could not expect the paying officer to do aught else than withhold the liquidated damages, and the plaintiff may not recover them.

Plaintiff is entitled to recover $6,614.82. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHITAKER, *Judge*, took no part in the decision of this case.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION v. THE UNTED STATES

[No. 43812. Decided May 7, 1945. Defendant's motion for new trial overruled October 1, 1945]*

On the Proofs

Government contract; increased wages; footing depth work; insufficient proof; remission of liquidated damages.—Where plaintiff contracted to construct 16 officers' quarters for the Government at Fort Sam Houston, Texas; and where claims were presented for work on spiral spacers, an increase in wages, an increase in lumber costs, payment for footing depth work, and remission of liquidated damages; it is *held* that plaintiff was entitled to recover for increased wages and for the work of footing depths, but since insufficient proof was presented concerning the spiral spacers and since the increase in lumber prices should have been known, and since the proper procedure for protest against the assessment of liquidated damages had not been followed, recovery for these claims is denied.

The Reporter's statement of the case:

Mr. Norman B. Frost, for the plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Joseph A. Holpuch Company, plaintiff herein, is a corporation of the State of Illinois chartered to engage in the general building construction business.

2. On November 2, 1933, the plaintiff entered into a contract with the defendant, represented by P. W. Guiney, Brig. General, Q. M. C., Chief, Construction Division, as contracting officer, whereby, for a consideration of $668,765 the plaintiff as contractor agreed to furnish all labor and materials, and perform all work required for the construction of 59 sets of company officers' quarters (two-story type), Fort Sam Houston, Texas, in accordance with specifications, schedules and drawings made a part of the contract. The contract was numbered W 6278 qm–108, and was on Govern-

*Defendant's petition for writ of certiorari granted March 4, 1946.

ment form P. W. A. 51 as a Federal Emergency Administration of Public Works project.

By the contract the work was to be commenced November 16, 1933, and be completed October 28, 1934, a period of 346 calendar days.

The contract, specifications, schedules and drawings are in evidence and made part hereof by reference.

Article 15 of the contract provided:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Article G. C. 10 of the specifications provided:

> *Interpretation of Contract:* Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. [meaning defendant's constructing quartermaster] shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

Article 5 of the contract provided:

> *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article G. C. 27 of the specifications provided:

> *Extras:* No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M., and the price stated in such order.

3. *Spiral spacers*, $681.45.

Reinforcing steel in concrete foundation piers was specified by the contract. It consisted of a circle of six parallel vertical rods, their surfaces deformed for binding effect, and a spiral encircling them, to which the rods were attached at regular intervals. With regard to this reinforcement Article 24 of the specifications provided:

> *Placing:* Metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections, and shall be supported by concrete or metal chairs or spacers, or metal hangers.

Article 36 thereof provided with respect to pouring of the concrete, that before pouring reinforcement should be thoroughly secured in position and approved by the constructing quartermaster.

Article 38 provided:

> *Compacting:* Concrete during and immediately after depositing, shall be thoroughly compacted by means of suitable tools. The concrete shall be thoroughly worked around the reinforcement and around embedded fixtures, and into the corner of the forms.

The reinforcement required by the specifications was designed to constitute a structure within itself, of such rigidity as to withstand the displacing action of the pouring and puddling of concrete. This structure was fabricated in twenty-foot sections, before being lowered down into the form for the pier. This form was a steel casing of the proper diameter and so equipped that it could be pulled after the concrete was poured. A tremie was used in the pouring. The reinforcing structure was "supported by concrete or metal chairs or spacers, or metal hangers," to keep it the proper distance from the surface of the concrete, in this case about two inches. There is no controversy over the requirement or fulfillment of this specification, immediately quoted above.

The provision that "metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable

clips at intersections," had reference to the tying of spiral and vertical rods together at their intersections.

It was possible to secure rods and spiral at their intersections firmly with No. 18 annealed wire.

The parties' officers at the site were disagreed as to the interpretation of Article 24 of the specifications, plaintiff taking the position that the spiral might be held at its intersections with the vertical rods by annealed wire, defendant taking the position that so-called "spiral spacers," having the sole function of maintaining regularity in the spiral turns, were required. The plaintiff ultimately furnished and used in the reinforcement structure a spiral spacer in the form of a light vertical channel in which at the requisite distances lugs had been punched, and in the fabrication of the structure the lugs were forced around the spiral rod holding it rigidly in place. There were two such channels used for spiral spacing, placed on opposite sides of the spiral. The reinforcing rods were six in number and were kept in place by annealed wire binding them to the spiral at selected intersections. By using the spiral spacer it was not necessary to tie the reinforcing rods at every intersection with the spiral rod, and it was not done.

No order was issued by the contracting officer requiring the use of a spiral spacer.

A spiral spacer was commonly used in such structures and was more practical than annealed wire.

January 9, 1935, the plaintiff submitted to the constructing quartermaster a claim for extra compensation for the use of spiral spacers, as follows:

> 385# of spacers per building, 59 buildings, 22,715#, or 11,357.5 tons @ $60.00 per ton (unit price set out in contract), $681.45.

There appears to have been no action on this claim.

Accurate placing and securing of the spiral without the use of a spiral spacer would have been an expense to the plaintiff which under the circumstances it did not incur.

There is no proof of the final extra expense if any, that plaintiff was put to, by reason of using a spiral spacer.

4. *Bricklayers' wages*, $4,162.16.

Article 18 of the contract, insofar as may here be pertinent, provided as follows:

> *Wages*.—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:
>
> | | |
> |---|---|
> | Skilled labor | $1.10 |
> | Unskilled labor | .45 |
>
> * * * * *
>
> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.
>
> * * * * *
>
> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.
>
> (f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

The minimum of $1.10 for skilled labor named in Article 18 (a) was modified by the parties to read "$1.00."

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works, in connection with another project for Army construction at San Antonio, Texas, to which plaintiff was not a party, formally

ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour, retroactive to February 2, 1934.

This decision was transmitted to the plaintiff by the constructing quartermaster March 20, 1934.

March 23, 1934, the constructing quartermaster advised plaintiff that all bricklayers employed on the project here in suit "will be paid at the rate of $1.25 per hour."

The plaintiff replied to this March 29, 1934, stating that it would be governed accordingly but under protest, and expected reimbursement of the difference of 25 cents per hour when the ultimate amount was ascertained.

On May 12, 1934, the constructing quartermaster advised the plaintiff that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity should be paid $1.25 per hour, retroactive to February 2, 1934, and that plaintiff would be within its "rights to file appeal with the Board of Labor Review from the decision of the contracting officer."

On July 16, 1934, the constructing quartermaster transmitted to the plaintiff copy of an undated decision by the Assistant Secretary of War in another case that the War Department could not review the decisions of the Board of Labor Review.

The bricklayers were paid $1.25 per hour accordingly, instead of $1.00. The hours of labor amounted to 13,196. At 25 cents an hour this amounts to $3,299.00. With 10 per cent thereof for overhead and 10 per cent of the aggregate for profit, this is increased to $3,991.79.

The issue as to whether bricklayers on the contract work here in suit should be paid $1.25 per hour or less was not submitted to the Board of Labor Review.

The plaintiff has not been paid the said sum of $3,991.79, or any part thereof.

5. *Increase in lumber prices*, $9,971.76.

Article 7 (c) of the contract provided:

> *N. R. A. materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery

Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

The Code of Fair Competition for the lumber and timber products industry was approved by the President August 19, 1933, and went into effect August 29, 1933.

The plaintiff signed the President's Reemployment Agreement August 25, 1933, under the National Industrial Recovery Act.

At the time bids were opened the Edward Hines Lumber Company furnished the plaintiff a quotation of unit prices on the kind of lumber called for under plaintiff's contract, "subject to change or previous sale without notice." The plaintiff based its bid on this quotation. The quotation was given plaintiff October 20, 1933.

On October 30, 1933, the Lumber Code Authority published minimum prices on Southern Yellow Pine Lumber (used largely in plaintiff's contract) effective November 9, 1933, which had the effect of increasing prices in Edward Hines Lumber Company's quotation.

By the time the plaintiff was ready to purchase the lumber the lumber company would not sell below the minimum prices established by the Code, by that time in effect, and plaintiff had to pay the higher prices.

The amount of this difference is $8,241.12. With ten per cent overhead and ten per cent profit on the aggregate, this would be increased to $9,971.75.

The plaintiff made no claim to the contracting officer for increased cost of lumber.

6. *Footing depths*, $4,922.87.

Articles 3 and 4 of the specifications provided:

3. *Excavation:* Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be deposited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.

Excavations for footings shall be carried down to the depth and levels shown on drawings. However, should

suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.

Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.

All excavations shall be maintained in good order during the progress of the work, and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.

4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring holes, the excavation must be cased with metal casings of ample strength to prevent crushing. Casings may be collapsible or of one length.

Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.

At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechanical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

Paragraph 45 of the Specifications provided:

CONCRETE WORK

45. *Footings, etc.:* The Contractor shall see that the bottom of all excavations are of undisturbed soil, properly leveled before pouring footings.

Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid.

If solid foundation is found at a lesser depth than the dimension given on the drawings, then a credit will be given the U. S., based on the "Unit Prices."

* * * * *

The depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and it was on this depth that plaintiff estimated its bid.

Soil beneath the projected houses was, when wet, shifting and unstable. Experience in the locality had demonstrated that building foundations were unsatisfactory when rested thereon, and that it was desirable for the footings to go below this uncertain soil to block clay having a good bearing value. The type of footing in use to prevent movement of the foundation in wet weather was a reinforced concrete pier with a bell-shaped bottom resting on block clay, beams from pier to pier at the surface being wedge-shaped to escape the lifting action of the soil.

In the project here involved there were 16 piers to a house with depths from the first floor level ranging from 27.58 feet to 42.42 feet, with an average of 34.43 feet.

Plaintiff excavated to depths approved by the defendant's inspectors. In making payment under the contract the defendant made extra allowance to the plaintiff for excavation in excess of 37 feet 6 inches from the first floor level, and withheld from the contract price the difference between actual excavation and 37 feet 6 inches where actual excavation was less than 37 feet 6 inches, all at the unit prices named in the contract. The applicable unit prices were contained in the following clause of the contract:

> The following unit prices shall be used as a basis for making additions to or deductions from the contract price, provided any deviation from the drawings and specifications increases or decreases the amount of work indicated and required therein. These prices shall include the furnishing of all labor and material complete in place, except as otherwise noted.
>
> * * * * *
>
> (2) Excavation in piers and Bell foundations One and 50/100 Dollars ($1.50) per cu. yd.
>
> * * * * *

(4) Concrete, Type B, in piers and bells Eleven Dollars ($11.00) per cu. yd.

(5) Reinforcing Steel Sixty Dollars ($60.00) per ton.

* * * * *

The adjustment made by the defendant was a net deduction of 2,892.16 linear feet, or $1,444.20, based on unit prices of $11 per cubic yard for concrete, $60 per ton for steel, and $1.50 per ton for excavation, all computed on a pay basis of 37 feet 6 inches. This deduction was calculated by the constructing quartermaster and applied by the paying officer. On a basis of 33 feet plaintiff's claim to recovery would be correctly stated at $4,922.87.

7. *Liquidated damages withheld*, $3,480.00.

The contract provided:

> The work shall be commenced November 16, 1933 and shall be completed October 28, 1934.
>
> The contractor shall pay to the Government as fixed, agreed and liquidated damages, the amount of Two Hundred Thirty-six ($236.00) Dollars for each calendar day of delay in the completion or acceptance of this work, beyond the date stated herein for completion, subject to the provision of Article 9 of this contract. In the event that one or more of the sets are completed at the time for completion mentioned herein, the fixed and agreed amount of liquidated damages ($236.00) will be reduced at the rate of Four Dollars ($4.00) per set per day for each set completed on time.

Article 9 of the contract provided:

> Art. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the

work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays, of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

July 2, 1934, the Quartermaster General issued an order increasing the time for completion by 15 days to cover change in size of six bells on each house. Fifteen days additional time would bring the completion date to November 12, 1934.

The various buildings were accepted by the constructing quartermaster as of the following dates in 1934, and in numbers as indicated:

	Number
November 1	5
November 8	7
November 13	6

	Number
November 16	6
November 24	7
November 29	6
December 7	5
December 11	5
December 13	6
December 15	6
	59

The parties to the contract construed it as prescribing computation of liquidated damages for delay in the following manner, and liquidated damages of $3,480 were accordingly withheld from the contract price in the last settlement:

Number of Buildings	Acceptance Date (1934)	Days of Delay	Rate Per Day	Damages
6	Nov. 13	1	$24	$24.00
6	Nov. 16	4	24	96.00
7	Nov. 24	12	28	336.00
6	Nov. 29	17	24	408.00
5	Dec. 7	25	20	500.00
5	Dec. 11	29	20	580.00
6	Dec. 13	31	24	744.00
6	Dec. 15	33	24	792.00
47				3,480.00

The buildings were accepted in lots as tendered by the plaintiff.

After the foundation piers were installed progress was normal, and the assessment and withholding of liquidated damages for delay was solely to cover alleged delay by the plaintiff in installing those piers, more particularly delay in the commencement of excavation for the piers.

The excavation was for cylindrical piers 18 inches in diameter, increased to 4 or 5 feet at the bottom in the shape of a bell, to increase the bearing area.

For structural considerations boring of the hole could not vary from the perpendicular and top and bottom had to center nicely. The bell shape at the bottom of the excavation was cut out with a reaming arrangement lowered into the hole in the final boring. It was possible to excavate the bell shape by hand, but this method, due largely to the confined space, was awkward and inefficient and not ordinarily resorted to.

Excavations of this form were peculiar to areas having the foundation difficulties here present, and the work was a

specialty. There were few concerns or individuals equipped and capable of making the necessary excavations.

On November 2, 1933, the plaintiff entered into a written agreement with The Excavating & Foundation Company, a Missouri corporation, hereinafter referred to as the Excavating Company, whereby that company undertook, among other things, to excavate for the pier foundations of the 59 buildings.

The specifications required the approval of all subcontractors by the constructing quartermaster. The constructing quartermaster promptly approved the Excavating Company as such subcontractor.

At this time the Excavating Company was doing identical work on a nearby project (herein referred to as the "S. & W." contract) under the jurisdiction of the same constructing quartermaster. In beginning the "S. & W." contract work the Excavating Company had run into two or three weeks' difficulties due to its own inexperience and lack of appropriate equipment. At the request of the contractor the Excavating Company called in to its assistance one A. H. Beck, of San Antonio, Texas, an individual trading as A. H. Beck Foundation Company, hereinafter referred to as the Beck Company, who was experienced and well equipped, and to whom the Excavating Company sublet half of the "S. & W." contract work. By that time the Excavating Company had perfected its equipment, was operating efficiently, and was prepared to do plaintiff's work.

In order to begin work on the Holpuch contract promptly the Excavating Company had prepared an extra rig, similar to the two it was using on the "S. & W." contract. In excavating, the physical work was done by common labor.

Work on the superstructures was wholly dependent upon the foundations, and plaintiff urged the Excavating Company to get started on the agreed excavation. The constructing quartermaster would not permit the Excavating Company to proceed with the Holpuch contract until the work it was doing on the "S. & W." contract was completed, nor would he permit the extra rig, so constructed by the Excavating Company, to be used on the Holpuch project.

The constructing quartermaster insisted that the Beck Company be given the work on the Holpuch job, and, in order to extricate itself from these difficulties, the Excavating Company sublet its entire work on the Holpuch job to the Beck Company, and the Beck Company in course of time performed it.

The delay for which liquidated damages were assessed and withheld was due solely to the constructing quartermaster's refusal to permit the Excavating Company to proceed with plaintiff's work when the plaintiff called upon it to do so.

This action on the part of defendant's constructing quartermaster, interfered with plaintiff's prosecutiton of its work, and prevented the plaintiff from completing the work by the agreed date.

The plaintiff did not notify the contracting officer of the cause of the delay, in the time, manner and form required by Article 9 of the contract.

8. The plaintiff appended to its last voucher for payment under the contract a list of claims, included in which were the items here in suit, covered by a note as follows:

> The acceptance of payment on this voucher is without prejudice to the right of the Contractor to submit its claims to the General Accounting Office as itemized on the attached paper.

There is no proof of submission of these claims to the General Accounting Office.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case and that of the same plaintiff, docket No. 43809, [*Ante*, p. 254] were heard, argued, and submitted together. They involve the same project, the erection of company officers' quarters at Fort Sam Houston, Texas, and where the buildings under one contract left off, the others began. The facts closely parallel each other.

What is said in the other case with respect to spiral spacers, applies here. For lack of the proof referred to, there can be no recovery.

With regard to bricklayers' increase in wages, the plaintiff is, for the reasons stated, entitled to recover $3,299.00 without profit or overhead.

The increase in lumber prices here was also an expense for which defendant is not liable. Notice of the increase under the Code was published before the plaintiff entered into the instant contract, very shortly before, it is true, but still before, and plaintiff had no firm and binding agreement with the lumber company as to prices.

As to footing depths, the figures are different, but the variance is not so great, or so persuasive, as to make the selection different. The 33-foot basis is the appropriate one to apply, and the plaintiff on that basis is entitled to recover $4,922.87. The contract was not altogether well-drawn and another instance perhaps of inartificiality is that the unit price for excavation in piers and bell foundations, for additions to and deductions from the contract price, is given in case No. 43809 as $60 per cubic yard, while in the case we have here, No. 43812, it is given as $1.50 per cubic yard, one being forty times that of the other. The suspicion can hardly be avoided that the contract was not free from mistakes.

The plaintiff's claim for remission of liquidated damages for delay must fail in this case as in the other, because the claim was not perfected in the manner agreed to. The paying officer was here also to be the Finance Officer, U. S. Army, Fort Sam Houston, Texas. He may or may not have been advised by the contracting officer as to deduction for liquidated damages, but the plaintiff here did not forestall the deduction by pursuing the contract formality of the ten-day notice under Article 9, which would have started in motion an administrative examination of the claim. Such an examination is here lacking and the plaintiff may not recover.

Plaintiff is entitled to recover $8,221.87. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHITAKER, *Judge*, took no part in the decision of this case.

CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION v. THE UNITED STATES

[Nos. 45688 and 45916. Decided May 7, 1945. Defendant's motion for new trial overruled October 1, 1945]

On the Proofs

Government contract; allotment of power under Boulder Canyon Project Act; general and uniform regulations required by the statute.—Section 5 of the Boulder Canyon Project Act (45 Stat. 1057) provided that "General and uniform regulations shall be prescribed" by the Secretary of the Interior "for the awarding of contracts for the sale and delivery of electrical energy." The Secretary on April 26, 1930, made a contract for the lease of the power privileges at the Boulder Dam to the City of Los Angeles and the Southern California Edison Company, under which the City agreed to operate a part of the power plant machinery of the dam and to generate electricity at cost for itself and others designated in the contract, and the Edison Company similarly agreed to operate the rest of the generating equipment to supply power to itself and to the plaintiff and others, the terms and conditions and effective dates being set forth fully in the contract, and being dependent upon the completion of the dam and the availability of stipulated amounts of electric energy. On November 5, 1931, the Secretary made separate contracts, under the Act, with plaintiff and others, including certain municipalities and the Los Angeles Gas and Electric Corporation, in each of which contracts the allottee agreed to take and pay for, or to pay for, the percentage named in the contract of the whole amount of firm energy to be generated at the dam, at the price of 1.63 mills per k. w. h.; and rights in secondary power were specified in the lease and contracts at .5 mill per k. w. h.; and in the lease a concession was made to the City of Los Angeles and to Edison, providing that for the first 3 years only certain stipulated percentages of their allotments need be taken each year, and any excess above these percentages would be charged for only at the .5 mill secondary power rate. This was the "load-building period" privilege, which the plaintiff in case No. 45688 claims it did not receive. This privilege was given to the Metropolitan Water District in its contract of April 26, 1930, which was also the date of the lease. It was not given to three smaller cities, nor to the Gas Company, nor to the plaintiff, in their contracts made in the autumn of 1931, but was later given to all of the municipalities and to the City of Los Angeles as successor to the Gas Company, but not, at least in the same form, to the plaintiff. Article 37 of the lease, a copy of which was attached to and made a part of plaintiff's contract, provided that "any modification, extension or waiver," of the

"terms, provisions or requirements," of the contract for "the benefit of any one or more of the allottees (including the lessees) shall not be denied to any other." *Held*, that, under the provisions of Section 5 of the Boulder Act and Article 37 of the lease, plaintiff is entitled to recover the amount which it paid, but would not have been required to pay if it had been given the load building privilege (Case No. 45688.)

Same; no waiver of plaintiff's rights under interim contract.—Where plaintiff, by its supplemental lease of July 22, 1937, agreed to take specified quantities of power during a period prior to the time when its original contract of 1931 would have required it to take power and to pay the firm power rate of 1.63 mills for this interim power except that any power taken by it in excess of stipulated percentages during the first 3 years of the interim contract would carry only the .5 mill rate; it is *held* that the acceptance of this interim contract by the plaintiff did not destroy its right, under the lease and its original contract, to have a load-building period of 3 years from June 1, 1940, the date when it became obligated under its original contract to begin to take and pay for power.

Same; agreement by the Government.—The Government had no right to set up, as to the plaintiff, something which, the Government claims, is the equivalent of, or practically as good as, the thing which the Government had expressly agreed that the plaintiff should have.

Same; denial of plaintiff's rights by the Government.—The right which the plaintiff claims accrued to it as a result of a statute, Government regulations of general effect, and contracts made by an authorized public officer, the effect of which was to fix rates and terms on which those entitled to power from the dam would get it; and the Government, as the vendor of power, should not be permitted to change those schedules to the prejudice of one of the purchasers, by denying to plaintiff the benefits of a load-building period for the 3 years beginning June 1, 1940.

Same; recovery under more favorable rate clause of contract and the statute.—The Secretary of the Interior refused to approve an interim contract with the plaintiff on the terms of the "Memorandum of Understanding" of October 3, 1934, under which contracts with others were made at the .5 mill rate; and after further negotiations, an interim contract with plaintiff was made on July 22, 1937, under which, besides other things, plaintiff was bound to take a stipulated amount of power per year, designated as "firm" power, at the 1.63 mills rate, and under which plaintiff was granted a load-building period. Article 33 of the contract provided that if more favorable rates should be granted to any other allottee or contractor, then the plaintiff should not thereafter be required to pay more than those rates, except that

Article 33 was not to apply to rates for the temporary resale of power allotted to the Metropolitan Water District.

Held, That plaintiff is entitled to recover the difference between what it paid for interim power and what it would have had to pay at a rate of .5 mill (Case No. 45916.)

Same; definition of "firm" power.—The interim power to which plaintiff was entitled under the contract of July 22, 1937, was not "firm" power, as that term was used in the Regulations, lease and contracts other than the interim contract with plaintiff; "firm" power being defined in those other documents as power which the Government agreed to deliver and the taker had the right to demand; whereas the power referred to in plaintiff's interim contract was secondary power, because it was not agreed to be delivered and was expressly made subject to the priorities of the City of Los Angeles, and subject also to be shared, if necessary, with others. The rate, set by public regulation and by agreement, applicable to secondary power, should have been applied to it.

Same; departure from rates set in Regulations, lease and contract.—The Secretary, having made secondary power available to the plaintiff by leasing to it the necessary generating machinery, could not, by labelling the secondary power as "firm" in the lease, depart from the rate set in the Regulations, lease and contract.

Same; plaintiff entitled to secondary power rate.—The Government, having made a contract with the City of Los Angeles, on July 6, 1938, giving the City a .5 mill rate for power, including interim power; which power, if secondary, yet had priority over the plaintiff's interim power, brought into play Article 33 of plaintiff's contract of July 22, 1937, and the plaintiff thereby became entitled to the .5 mill rate at least from July 6, 1938.

Same; interim contract entered into under economic duress not a waiver of rights.—Where it is found upon the evidence that plaintiff endeavored to obtain an interim contract along the lines of the 1934 Memorandum of Understanding; and where it was apparent in 1937 that this could not be accomplished; and where it is found that it would not have been prudent, even if possible, for plaintiff to obtain power from any other source; it is *held* that plaintiff entered into the interim contract of July 22, 1937, under economic duress, and the contract did not constitute a waiver of any rights to which plaintiff was otherwise entitled.

Same; estoppel.—One who has a right to obtain a service from a public utility for which service there is a charge fixed by law, cannot estop himself from challenging a higher charge by an agreement to pay it; and a comparable doctrine is applicable to the instant case.

The Reporter's statement of the case:

Mr. Henry W. Coil for the plaintiff. *Mr. Douglas L. King* was on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Delaware corporation. Prior to June 30, 1941, its name was Nevada-California Electric Corporation. Southern Sierras Power Company, a Wyoming corporation, owned and operated a system of electric power plants and lines serving the southeastern portion of California. Plaintiff owned its outstanding stock and completely controlled it. On December 1, 1936, it was liquidated and plaintiff acquired all its assets and assumed all its contracts and liabilities. Plaintiff, therefore, has all the rights of Nevada-California Electric Corporation and Southern Sierras Power Company.

2. In accordance with the provisions of Section 5 of the Boulder Canyon Project Act approved December 21, 1928, the Secretary of the Interior, on April 25, 1930, promulgated General Regulations for the lease and sale of electrical energy at the Boulder Dam. Plaintiff's Exhibit 2, pp. 103–114, contains a true copy of said General Regulations, as amended on March 10, 1931, July 1, 1931, and November 16, 1931.

3. Pursuant to the provisions of the Boulder Canyon Project Act, approved December 21, 1928 (45 Stat. 1057), requiring the Secretary of the Interior, prior to the expenditure of any money in the construction of the dam, to make provision by contract for revenues adequate in his judgment to insure payment of all expenses of operation and maintenance and the repayment with interest within 50 years of the date of completion of the works of all amounts advanced to the fund created for the construction of the dam, the Secretary of the Interior, on April 26, 1930, caused to be executed in the name of the United States a contract with the City of Los Angeles and Southern California Edison Company, Ltd., for the lease of power privileges. (Exhibit A to petitions and made a part hereof by reference.)

4. By the contract of lease of power privileges, the City of Los Angeles and Southern California Edison Company, Ltd. were made, severally, lessees of the power plant machinery of the dam to be constructed, and were obligated to generate at cost electric energy for themselves and other allottees of energy with whom contracts were to be made by the Secretary for the sale of energy, the principal allottee being the Metropolitan Water District. This contract of lease with power privileges was to begin to run as to the City of Los Angeles when water should become ready for delivery to it, and it and certain municipal corporations, which as allottees were entitled to have their energy generated by the City, were obligated and entitled to commence taking energy when the Secretary of the Interior should announce that 1,250,000,000 kilowatt-hours of energy per year were ready for delivery. The Metropolitan Water District was to become obligated and entitled to begin receiving its energy, generated by the City, when the Secretary should announce that 2,000,000,000 kilowatt-hours were available, but not sooner than one year after energy should become ready for delivery to the City. Southern California Edison Company, Ltd. and allottees under it (Southern Sierras Power Co. and Los Angeles Gas & Electric Corporation) were to become obligated and entitled to begin receiving energy when the Secretary should announce that water capable of generating 4,240,000,000 kilowatt-hours per year was available, but not sooner than three years after commencement of delivery to the City. This contract of lease of power privileges was to expire as to both the City and Southern California Edison Company, Ltd., and the allottees under each, at the expiration of 50 years after the date it should become effective as to the City. It thus had 50 years to run as to the City and municipal corporations, 49 years as to Metropolitan Water District, and 47 years as to Southern California Edison Company, Ltd. and the allottees under it.

The City was required to generate energy for itself, the Metropolitan Water District, the States of Nevada and Arizona if they should desire to contract for energy, and the municipal corporations. Southern California Edison Company, Ltd., was required to generate energy for itself, Los

Angeles Gas & Electric Corporation, and Southern Sierras Power Co.

The entire firm energy, 4,240,000,000 kilowatt-hours, was allocated to the lessees and allottees, but since there was a probability that the height of the dam would be raised, thus giving an additional 90,000,000 kilowatt-hours, the United States reserved the right to dispose of this 90,000,000 kilowatt-hours to any municipality by firm contract.

Total firm energy was fixed as 4,240,000,000 kilowatt-hours per year for the first year of complete operation (June 1 to May 31, inclusive), subject to a progressive reduction of 8,760,000 kilowatt-hours each year thereafter because of silting and increased irrigation above the dam. Secondary energy was defined as all energy generated in any year in excess of the amount of firm energy for that year. There was a further provision that, "in arriving at the respective rates for 'firm energy' and 'secondary energy' as fixed herein, recognition has been given to the fact that 'secondary energy' cannot be relied upon as being at all times available, but was subject to diminution or temporary exhaustion; whereas 'firm energy' is the amount of energy agreed upon as being available continuously as required during each year of the contract period."

Each lessee (and by later contracts, each allottee who executed a contract) was obligated to take and/or pay for a stated percentage of firm energy per year. The price of firm energy was fixed at 1.63 mills per kilowatt-hour and secondary energy at one-half mill per kilowatt-hour, but there was a load-building or absorption period proviso to the effect that in order to afford a reasonable time for the lessees, City of Los Angeles and Southern California Edison Company, Ltd., to absorb the energy contracted for, the minimum annual payments by each for the first three years after energy should be ready for delivery to such lessees, respectively, as announced by the Secretary, should be as follows, in percentages of the ultimate annual obligation to take and/or pay for firm energy:

First year	55 percent
Second year	70 percent
Third year	85 percent
Fourth and subsequent years	100 percent

The proviso also stated that:

> During said absorption period, if the quantity of energy taken in any one year (June 1 to May 31, inclusive), is in excess of the above percentage of the ultimate obligation during such year to take and/or pay for firm energy, such excess shall be paid for at the rate for secondary energy.

The contract of lease of power privileges also contained the following provision:

> (37) Any modification, extension, or waiver by the Secretary of any of the terms, provisions, or requirements of this contract for the benefit of any one or more of the allottees (including the lessees) shall not be denied to any other. (Exhibit A to petitions.)

5. Article V, subdivision F, clause (ii) of the General Regulations and Article (14), subdivision F, clause (ii) of the Lease of April 26, 1930, provided that so much of the energy contracted for by the Municipalities of Pasadena, Burbank and Glendale and not taken or used by them should be taken and paid for by the City of Los Angeles. (Plaintiff's Ex. 2, p. 138.)

6. Also on April 26, 1930, the Secretary caused to be executed a contract between the United States and the Metropolitan Water District whereby the latter agreed to take and/or pay for 36 percent of the firm energy at 1.63 mills per kilowatt-hour, and secondary energy at one-half mill per kilowatt-hour, but with a three-year load-building or absorption period proviso against the firm energy similar to the one in the contract of lease of power privileges described in finding 3. (Plaintiff's Ex. 2, p. 157.)

Contracts having thus been entered into which in the opinion of the Secretary complied with the requirements of the Boulder Canyon Project Act, the work of constructing the dam was started, and was completed in the year 1936.

7. On November 12, 1931, the Secretary caused to be executed a contract between the United States and the Los Angeles Gas & Electric Corporation for the purchase of and/or payment for a certain percentage of firm energy, and on November 5, 1931, he caused a similar contract to be executed with Southern Sierras Power Company. On September 29, 1931, November 12, 1931, and November 10, 1931, he caused similar contracts to be entered into between the United

States and the municipal corporations of Pasadena, Glendale, and Burbank, respectively. Each of these contracts bound the contractor to take and/or pay for the stated percentage of firm energy and fixed the price of firm energy at 1.63 mills per kilowatt-hour. None of them contained a load-building or absorption period proviso against firm energy, as did the contract of lease of power privileges in favor of the City of Los Angeles and Southern California Edison Company, Ltd., and the contract with Metropolitan Water District in favor of Metropolitan Water District. Each of them contained a provision reciting that the United States had entered into the contract of lease of power privileges of April 26, 1930, and that a copy thereof was "attached hereto marked Exhibit A, and by this reference made a part hereof." (Plaintiff's Ex. 2, pp. 177, 197, 219, 239, and 259.)

The contract of November 5, 1931, between the United States and Southern Sierras Power Company provided that any charges not paid when due should bear a penalty of 1% per month until paid, and if the plaintiff was delinquent for 12 months in the payment of charges, no energy should, except with the consent of the Secretary, be generated for the plaintiff, and the Secretary reserved the right to terminate the plaintiff's contract and dispose of the energy elsewhere, the plaintiff nevertheless to remain liable to make the United States whole for the period of the contract for all loss or damage by reason of the plaintiff's failure to take and pay for its allotment of energy.

8. The contract of lease of power privileges and the contract with Metropolitan Water District, both dated April 26, 1930, together with the contracts of November 12, 1931, November 5, 1931, September 29, 1931, November 12, 1931, and November 10, 1931, with Los Angeles Gas & Electric Corporation, Southern Sierras Power Company, and the cities of Pasadena, Glendale, and Burbank, respectively, bound the contractors (lessees and allottees) on final completion of the dam to take and/or pay for 100 percent of the firm energy, i. e., 4,240,000,000 kilowatt-hours per year, subject to the progressive reduction of 8,760,000 kilowatt-hours per year resulting from silting and upstream irrigation. The disposition was as follows:

	Firm energy			Secondary energy
	Minimum which United States must supply (percent)	Contractor's obligations if energy is available (percent)	Maximum which contractor can demand under various conditions (percent)	
Arizona [1]	18		22	None.
Nevada [1]	18		22 (18 percent plus 4 percent if not used by other State).	None.
Metropolitan Water District.	36	36	72 percent (its own minimum plus first call on unused State energy).	First call on all secondary energy.
Los Angeles	14.9054 (13 percent plus uncontracted municipality energy).	32.9054 (its minimum, plus ½ unused State energy, subject to Metropolitan's first call).	32.9054	Call on ½ secondary energy, subject to Metropolitan's first call.
Pasadena	1.6183	1.6183	1.6183	None.
Glendale	1.8867	1.8867	1.8867	None.
Burbank	0.5896	0.5896	0.5896	None.
Southern California Edison Co.	7.2	21.6 (7.2 percent plus 80 percent of ½ unused State energy).	21.6	Call on 80 percent of ½ of secondary energy, subject to Metropolitan's first call.
Los Angeles Gas & Electric Corp.	0.9	2.7 (0.9 percent plus 10 percent of ½ unused State energy).	2.7	Call on 10 percent of ½ of secondary energy, subject to Metropolitan's first call.
uthern Sierras Power Co.	0.9	2.7 (0.9 percent plus 10 percent of ½ unused State energy).	2.7	Call on 10 percent of ½ of secondary energy, subject to Metropolitan's first call.
Total	100	100		

[1] To be contracted for as needed.

(Plaintiff's Ex. 2, p. 25.)

9. Although it was not expected that the Secretary would announce that 1,250,000,000 kilowatt-hours per year of energy would be ready for delivery until about June 1, 1937, it was known that the dam would be completed in 1936 and that prior to the announcement substantial quantities of energy could be generated although not as much as 1,250,000,000 kilowatt-hours per year. This was because water would have to be released for irrigation and other purposes anyway and by running it through the power equipment energy could be produced. It was also known that for the same reason more than 1,250,000,000 kilowatt-hours and more than 2,000,000,000 kilowatt-hours, respectively, could be generated after each former announcement but prior to the announcements of 2,000,000,000 and 4,240,000,000 kilowatt-hours. Accordingly, the City of Los Angeles, Southern Sierras Power Company and Southern California Edison Company, Ltd., applied to the Secretary for interim contracts for that energy but at the rate for secondary energy. The application of Southern Sierras Power Company and Southern California Edison Company, Ltd., was a joint application. Southern Sierras Power Company also requested that a load-building or absorption period proviso be written into its contract for firm energy.

10. The City of Los Angeles protested against the Southern Sierras Power Company being given an interim contract at the secondary energy rate, as a result of which a conference was held on October 3, 1934, in Washington, D. C., at which were present representatives of the City of Los Angeles, Southern Sierras Power Company, the U. S. Bureau of Reclamation and the U. S. Department of the Interior, at which a "Memorandum of Understanding" was composed and signed by the representatives, which memorandum said that it was agreed that the United States would give the City an interim contract by which it could take energy at the secondary energy rate from the time energy could first be generated until the Secretary should announce that 1,250,000,000 kilowatt-hours of energy were ready for delivery, that the United States would give the municipalities of Pasadena, Glendale and Burbank load-building or absorption period provisos against their firm energy commitments

similar to those originally given to the lessees and to Metropolitan Water District against their firm energy commitments, that the United States would give the Southern Sierras Power Company and the Nevada-California Power Company an interim contract by which they could take energy at the secondary energy rate from the time energy could first be generated until the time Southern Sierras Power Company should become firmly obligated to purchase power under its contract of November 5, 1931, and that the City would withdraw its protest against the giving of an interim contract to Southern Sierras Power Company and Nevada-California Power Company. (Plaintiff's Ex. 36.) This agreement, however, was never approved by the Secretary.

11. On October 22, 1934, a contract was entered into between the United States and the City of Los Angeles whereby the latter was permitted to begin operating a part of the generating machinery as soon as water should become available and to pay for energy taken by it prior to the announcement of 1,250,000,000 kilowatt-hours per year at only the rate for secondary energy. In consideration for this the City conveyed to the United States 640 acres of land which it owned within the reservoir site of the dam and on November 1, 1934, withdrew its objection to the awarding of an interim contract to the Southern Sierras Power Company. (Plaintiff's Ex. 23.) It was provided in this contract of October 22, 1934, that its provisions applied only to the period in advance of the taking effect of the lease of April 26, 1930, and that said lease should not be in any manner affected or modified by the contract of October 22, 1934. The City began taking energy under this interim contract of October 22, 1934 in October 1936, and continued taking under it until June 1, 1937.

12. The United States, acting by the Secretary of the Interior, on October 22, 1934, made another contract with the City of Los Angeles, containing, among others, the following provision:

OBLIGATION OF THE CITY

(9) The provisions of Article (14), Subdivision F, Clause (ii) of said Lease of Power Privilege, shall not be construed to require the City, during the first

> three years, to take or pay for, in any event, any portion of the respective allocations to the said Municipalities other than the amounts by which their respective requirements may be less than fifty-five per centum (55%) of their respective ultimate annual obligations for the first year, or less than seventy per centum (70%) of their respective ultimate annual obligations for the second year, or less than eighty-five per centum (85%) of their respective ultimate annual obligations for the third year.

(Exhibit 1 annexed to each of Plaintiff's Exhibits 4, 5 and 6.)

13. On October 30, 1934, November 1, 1934, and October 30, 1934, the municipal corporations of Pasadena, Glendale and Burbank, respectively, were given supplemental contracts containing three-year load-building or absorption period provisos against their firm energy commitments similar to the ones of the City of Los Angeles, Southern California Edison Company, Ltd., and Metropolitan Water District. (Plaintiff's Exs. 4, 6, and 5.)

14. The Secretary declined and refused in 1934, 1935, and 1936, to give to Southern Sierras Power Company either a load-building or absorption period proviso, or an interim contract for energy at the secondary energy rate.

15. In May 1937 the Secretary of the Interior announced and gave notice that 1,250,000,000 kilowatt-hours of energy per year would be ready for delivery on June 1, 1937, thus putting into effect on June 1, 1937, the original contractual obligations of the City of Los Angeles and the obligations of the municipal corporations of Pasadena, Glendale, and Burbank.

In June 1938, the Secretary announced and gave notice that 2,000,000,000 kilowatt-hours of energy per year would be available on July 1, 1938, thus putting into effect on July 1, 1938, the contractual obligations of Metropolitan Water District.

In May 1940, the Secretary announced and gave notice that water capable of generating 4,240,000,000 kilowatt-hours of energy per year would be available on June 1, 1940, thus putting into effect on June 1, 1940, the contractual obligations of Southern California Edison Company, Ltd., Los

Angeles Gas & Electric Corporation, and Nevada-California Electric Corporation which at that time had succeeded to the rights and contractual obligations of Southern Sierras Power Company.

16. On February 1, 1937, the City of Los Angeles acquired all of the properties of Los Angeles Gas & Electric Corporation, including its contract of November 12, 1931, mentioned in finding 7. Nevertheless, the City of Los Angeles renewed its objection to the Secretary giving Nevada-California Electric Corporation an interim contract at the secondary energy rate.

17. On July 22, 1937, a supplemental contract was entered into between the United States and Nevada-California Electric Corporation whereby a part of the machinery to be later operated by Southern California Edison Company, Ltd. was leased to Nevada-California Electric Corporation for the purpose of generating energy until the time when the Secretary should announce that water capable of generating 4,240,000,000 kilowatt-hours of energy per year was available. (Exhibit 2 in appendix to petition in No. 45916, p. 36.) This supplemental contract provided that of this interim power thus generated, 114,280,000 kilowatt-hours during the first year, 114,048,000 during the second year, and 113,817,000 during the third year should constitute firm energy and be paid for by Nevada-California Electric Corporation at 1.63 mills—the firm energy rate—and that energy over and above those amounts should be secondary energy at the secondary energy rate. Then followed a load-building or absorption period proviso against this firm energy in language similar to the proviso in the contract of lease of power privileges of April 26, 1930. A copy of that lease was attached to and made a part of the July 22, 1937, contract. There was also a provision as follows:

> (33) In the event rates and charges more favorable than those herein required to be paid by the Company are granted to any present allottee or contractor of electrical energy to be developed at Boulder Dam power plant; then, and in such event, the rates and charges herein agreed to be paid by the Company shall be adjusted so that from and after the date such lesser rates and charges become effective the Company shall not be

> required to pay rates and charges greater than those required to be paid by any present allottee or contractor of electrical energy to be developed at Boulder Dam power plant; provided, however, that the provisions of this article shall not be construed to apply to rates and charges fixed in contracts covering the temporary resale of electrical energy allotted to The Metropolitan Water District of Southern California.

The period of operation under this supplemental contract of July 22, 1937, was from August 16, 1937 to May 31, 1940, inclusive, a period of 2 years, 9½ months. Thus plaintiff got a load-building or absorption period proviso, but not against the firm energy commitment in its original contract, and it got a contract for interim power, but a large part of the energy to be taken under it was to be paid for at the firm energy rate.

The energy taken by plaintiff under the supplemental contract of July 22, 1937, proved to be constant, but under that supplemental contract plaintiff's right to get it was subject to contingencies over which it had no control and to the prior rights of others, the provision of the contract being:

> * * * The Company shall not have the right to demand the release of any quantities of water for the generation of electrical energy, or otherwise, but shall have the right to the use of waters released from Lake Mead for the generation of electrical energy only as, if and when, as conclusively determined by the Secretary, water is available for the use of the Company for such purpose over and above quantities of water required for fullest operation of electrical generating equipment heretofore furnished and installed or hereafter to be furnished and installed by the United States for the use and benefit of The City of Los Angeles (and its Department of Water and Power), pursuant to the aforesaid contract of date April 26, 1930, and the aforesaid supplements thereto, hereinbefore designated as "Exhibit A," or pursuant to that certain contract between the United States and The City of Los Angeles, and its Department of Water and Power, of date October 22, 1934, designated "Permit and License to Use Machinery and Power Plant Facilities," and heretofore furnished and installed, or hereafter to be furnished and installed for the use and benefit of others that have contracted with the United States for the purchase of electrical

energy to be generated at Boulder Dam power plant, and are entitled or obligated, under contracts heretofore made, to take electrical energy prior to the time Southern California Edison Company Ltd. is entitled or obligated to take electrical energy to be thus generated * * *.

18. At the time Nevada-California Electric Corporation entered into the supplemental contract of July 22, 1937, it was in great necessity of acquiring additional energy with which to supply the needs of its customers and was in some danger of losing a portion of its sources of acquiring energy, i. e., an interchange contract it had with Los Angeles Gas & Electric Corp. It had done all it could do to induce the Secretary to give it a more favorable supplemental contract.

19. On July 6, 1938, the City of Los Angeles, it having in the meantime acquired by assignment the contractual obligations and rights of the Los Angeles Gas & Electric Corporation, entered into another contract with the United States, known as the "Third Circuit Contract." (Plaintiff's Ex. 7.) Under this Third Circuit Contract the City of Los Angeles agreed to construct and maintain a third transmission circuit from the dam to Los Angeles and to take and/or pay for certain additional quantities of energy. This contract also provided that "in order to afford the City the same privileges, with respect to the firm energy contracted for by the Los Angeles Gas & Electric Corporation under the Gas Corporation Contract, assigned by that corporation to the City, which have been afforded to certain other allottees," the City should have as to the firm energy taken under the Los Angeles Gas & Electric Corporation contract a load-building or absorption period proviso similar to the one in its favor in the contract of lease of power privileges of April 26, 1930, and the ones in the contracts of Metropolitan Water District and in the supplemental contracts of the municipal corporations of Pasadena, Glendale, and Burbank, and such a proviso was written into said Third Circuit Contract in the following language:

> * * * the minimum annual payments to be made by the City with respect to the firm energy so contracted for, for the first three years after such energy is ready for delivery to the City as assignee of the said Cor-

> poration, under the terms of the Lease and the Gas Corporation Contract, shall be as follows: in percentages of the ultimate annual obligation to take and/or pay for firm energy under said Gas Corporation Contract and said assignment thereof; First year, 55 percent, Second year, 70 percent, Third year, 85 percent, Fourth year and all subsequent years, 100 percent.
>
> The privileges extended by this Article shall be deemed to have been in effect as of October 30, 1934, the date on which similar privileges were granted to certain other allottees.

The contract of July 6, 1938, further provided that the generation of energy allocated to Los Angeles Gas and Electric Corporation and assigned to the City of Los Angeles might be effected by the City, at its option, as though so provided in Article (10) (d) of the lease of April 26, 1930, that is, in the machinery provided for the City instead of that provided for Los Angeles Gas and Electric Corporation.

The Third Circuit Contract of the City of Los Angeles, dated July 6, 1938, provided that, if the United States made available to the City, in accordance with the lease of April 26, 1930, and that contract, the necessary water, the City would take and pay for, in accordance with its optional rights under said lease, a quantity of electric energy in excess of 3,000,000,000 kilowatt-hours, during the period ending May 31, 1945, all such energy to be paid for at the rate for secondary energy, and the contract further provided:

> Water will be delivered by the United States for the generation of energy hereunder in accordance with Article (21) of the Lease. The term "load requirements" as used therein with reference to the City shall include, after the City has constructed its third circuit under this agreement and throughout the remaining life of the Lease, the requirements of the City for temporary increases in the delivery of water for generation of firm energy during periods when another source of power is out of service by reason of an emergency. If, in consequence thereof, the City uses water for the generation of firm energy in excess of its allocation during any year of operation, the Secretary may, in his discretion diminish delivery of water to the City for the generation of firm energy during the following year of operation by an equivalent quantity.

Article (21) of the lease thus referred to provided that:

> The United States will deliver water continuously to each lessee in the quantity, in the manner, and at the times necessary for the generation of the energy which each of said lessees has the right and/or obligation to generate under this contract in accordance with the load requirements of each of said lessees and of allottees for which the respective lessees are generating agencies.

The City of Los Angeles lease of April 26, 1930, contained a formula for determining the rate for firm energy in the advent of periodic rate adjustments which were provided for under said lease, but it contained no formula for determining the rate for secondary energy. The Third Circuit Contract of said City, dated July 6, 1938, provided that, in all future adjustments of rates for secondary energy (which should be uniform for all contractors having rights to secondary energy), the rate for secondary energy should be the price for firm energy plus fixed and operating costs of generation and transmission of such energy, less all or such portion of all reasonable fixed and operating costs as are chargeable specifically and solely to generating and transmitting secondary energy and providing, maintaining and intermittently operating such standby plants as are necessary to make such secondary energy equally as reliable and continuously available as firm energy.

20. On October 14, 1938, an interim contract was entered into between the United States and Southern California Edison Company, Ltd., giving the latter the right to take, until June 1, 1940, large quantities of Metropolitan Water District's unused firm energy and to pay for it at only the secondary energy rate of one-half mill. (Plantiff's Ex. 34.)

The plaintiff's contract of November 5, 1931, provided that no disposition of firm energy allocated to but not used by Metropolitan Water District should be made by the Secretary without first giving to the plaintiff the right to contract for such energy on equal terms and conditions, but no such right to contract for the Metropolitan Water District's unused firm energy at the secondary energy rate or at any rate less than the firm energy rate was ever given by the

Secretary to the plaintiff, and no notice was given to the plaintiff by the Secretary of his proposal or intention to make the contract of October 14, 1938, with Southern California Edison Company, Ltd., although the Secretary did, in September 1937, give plaintiff the opportunity to contract for such Metropolitan Water District's unused firm energy at the rate of 1.63 mills per kilowatt-hour.

21. Because of the large amount of energy taken, the load-building or absorption period provisos operated as to the City of Los Angeles, both in its own right and as assignee of Los Angeles Gas & Electric Corporation, and as to Southern California Edison Company, Ltd., and the municipal corporations of Pasadena, Glendale and Burbank, mainly as mere rate reductions and they received the benefits intended thereby. This, however, was not true as to Metropolitan Water District as it did not take a large part of the firm energy it was obligated to take and/or pay for.

22. In addition to the original request, Southern Sierras Power Company, or Nevada-California Electric Corporation, or plaintiff, on July 8, 1940, September 17, 1940, and February 4, 1941, made written requests upon the Secretary to be accorded a load-building or absorption period proviso or concession against firm energy under the original contract of November 5, 1931 with Southern Sierras Power Company, but the Secretary denied such requests. On May 2, 1940, February 4, 1941, and June 20, 1941, plaintiff applied to the Secretary for a reduction to one-half mill per kilowatt-hour on the interim "firm" energy taken under the supplemental contract of July 22, 1937, with Nevada-California Electric Corporation, but the Secretary also denied these requests.

23. In the sale and distribution of energy there was some competition between plaintiff and Southern California Edison Company, Ltd., between plaintiff and the City of Los Angeles, and between Southern California Edison Company, Ltd. and the City of Los Angeles.

24. Pursuant to the act of Congress approved July 19, 1940 (54 Stat. 774), known as "Boulder Canyon Project Adjustment Act," the Secretary on May 20, 1941, promulgated new regulations applicable to the generation and dis-

posal of electrical energy, and, pursuant to said Act and prior Acts, entered into a certain "Contract for Operation of Power Plant," dated May 29, 1941, with the City of Los Angeles and Southern California Edison Company, Ltd., terminated the "Contract for Lease of Power Privileges" dated April 26, 1930, and on or about May 29, 1941, made certain contracts herein called "Adjustment Contracts," effective for the period ending May 31, 1987, with each and all allottees hereinbefore mentioned, whereby all prior existing leases and contracts of the lessees and allottees were terminated, and whereby the allotment of firm and secondary energy and the minimum obligation to take and pay for firm energy of each of the lessees and allottees as provided in prior existing leases and contracts were unchanged, but the rate for falling water for the generation of firm energy was reduced from 1.63 to 1.163 mills per kilowatt-hour and for secondary energy from .5 mills to .34 mills per kilowatt-hour, both rates retroactive to June 1, 1937, the necessary refunds to be made on future bills. In each of those adjustment contracts provision was made whereby the then unexpired and unenjoyed portion, if any, of the absorption period provided for in the prior leases and contracts respectively was carried over into each of the adjustment contracts. (Plaintiff's Exhibits 17, 18, 19, and 20.)

25. In the adjustment contract of May 29, 1941, with the City of Los Angeles, the City's obligation to take and/or pay for energy for the period ending May 31, 1945, as set forth in the City's Third Circuit Contract of July 6, 1938, was carried over into the adjustment contract, such energy to be paid for at the adjusted rate for secondary energy, and it was further provided that the United States would deliver water to the City in the quantity, in the manner, and at the times necessary for the generation of that energy.

26. It was provided in Article 15 of plaintiff's adjustment contract that it was understood that plaintiff claimed that (1) it is entitled to an absorption period for the three years commencing June 1, 1940, and that (2) it was obligated to pay only at the rate for secondary energy for all energy taken by it under the contract of July 22, 1937; also, that it was agreed that neither the termination of the original

contract between the parties nor the termination of the contract dated November 12, 1931, between the United States and Los Angeles Gas and Electric Corporation and assigned to the City, nor the termination of the lease, nor anything contained in the contract or in the contract for the operation of the Boulder Power plant or in the General Regulations, should terminate, modify or otherwise affect the relative rights and obligations of the parties as they existed on May 19, 1941; also, that the rights and obligations of the parties should be conformed to said relative rights and obligations as finally determined, provided that, pending such determination, payments should be made by plaintiff in accordance with departmental determination and the provisions of the adjustment contract, but without prejudice to the rights of plaintiff, and provided that plaintiff should be estopped from asserting the claim referred to in "(1)" above, and the denial thereof by the defendant should be final, conclusive and binding if court proceedings with respect to it should not be commenced on or before May 31, 1942, and provided further that plaintiff should be estopped from asserting the claim referred to in "(2)" above, and the departmental decision thereon should be final, conclusive and binding if (in the event said departmental decision be adverse to plaintiff) arbitration or court proceedings with respect to it should not be commenced within one year from the date of the departmental decision.

These suits were instituted within the periods stated and in due time.

27. All of the contracts mentioned in the foregoing findings of fact are in evidence and are by reference made a part of these findings.

28. If plaintiff is entitled to a load-building or absorption period proviso or concession, sued for in No. 45688, the amounts due it are $41,369.78 for the operating year June 1, 1940 to May 31, 1941, inclusive; $27,307.36 for the operating year June 1, 1941 to May 31, 1942, inclusive; and $13,495.40 for the operating year June 1, 1942 to May 31, 1943, inclusive, a total of $82,172.54.

29. Plaintiff, under the supplemental contract of July 22, 1937, paid for 223,671,094 kilowatt-hours of energy at the

firm energy rate of 1.63 mills per kilowatt-hour and 117,-205,196 kilowatt-hours at the secondary energy rate of one-half mill per kilowatt-hour. If plaintiff had been required to pay for the 223,671,094 kilowatt-hours at only the secondary energy rate, it would have paid only $180,502.55, and the difference, $184,081.31, is the amount sued for in No. 45916.

The court decided that the plaintiff was entitled to recover in each case.

MADDEN, *Judge*, delivered the opinion of the court:

In these two cases we have written one set of findings of fact and one opinion. In case No. 45688 the plaintiff sues for $82,172.54, claiming that it was overcharged this amount by the Government for electric power taken by the plaintiff from a generating plant at Boulder Dam, in that it was denied a "load-building" or "load-absorption" period which, if granted, would have reduced its charges by the amount stated. In case No. 45916 the plaintiff sues for $184,081.31 which, it claims, it was overcharged for Boulder Dam electric power under an "interim" contract with the Government, in that it was required to pay 1.63 mills per kilowatt-hour for secondary power when the lawful price for such power was only .5 mill. References to the plaintiff apply, depending on the time of the action referred to, to the plaintiff's former wholly owned subsidiary, the Southern Sierras Power Company, or to the plaintiff itself, either under its former name, the Nevada California Electric Corporation, or under its present name.

The Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057, required the Secretary of the Interior to obtain contracts, from future purchasers of power to be generated at the dam, adequate in his judgment to insure the payment of all costs of operation and maintenance and the repayment within 50 years from the date of completion of the project of the cost of building it, with interest. Unless and until such contracts were obtained, no money was to be spent in constructing the dam. The Secretary, on April 26, 1930, made a contract for the lease of the power privileges at the dam to the City of Los Angeles and the Southern Cali-

fornia Edison Company. The City agreed to operate a part of the power plant machinery of the dam and to generate electricity at cost for itself, the Metropolitan Water District, the States of Nevada and Arizona if and when they should elect to take power, and certain other municipal corporations which were, by contracts to be made, to receive allotments of power. Edison similarly agreed to operate the rest of the generating equipment to supply power to itself and to the plaintiff and the Los Angeles Gas and Electric Corporation. The lease contract provided that the City and the other municipalities should be entitled and obligated to take power when the Secretary should announce that 1,250,000,000 kilowatt-hours per year of energy were ready for delivery; that the Metropolitan Water District, with which the Secretary on the same day made a contract for a large allotment of power, was to become entitled and obligated to take power when the Secretary should announce that 2,000,000,000 k. w. h. were available, but not sooner than 1 year after the commencement of delivery to the city; and that Edison and the other private allottees were to become entitled and obligated to take power when water capable of generating 4,240,000,000 k. w. h. was available, but not sooner than 3 years after commencement of delivery to the City. The lease was to run for 50 years from the date when delivery of power to the City should begin.

In the autumn of 1931, the Secretary made separate contracts with the cities of Pasadena, Glendale, and Burbank, California, the Los Angeles Gas and Electric Corporation and the plaintiff. The plaintiff's contract was dated November 5, 1931. In each of these contracts the allottee agreed to take and/or pay for the percentage named in the contract of the whole amount of firm energy to be generated at the dam, at the price of 1.63 mills per k. w. h.

The lease and the several contracts allotted, by percentages, the entire 4,240,000,000 k. w. h. per year among the several allottees as firm power, i. e., as power which the Government bound itself to deliver and the allottees bound themselves to pay for. The rate to each allottee for firm power was 1.63 mills per k. w. h., except as that rate was

affected by the load-building or absorption period discussed hereinafter. It was contemplated that there would actually be more than 4,240,000,000 k. w. h. of power available, and the possible excess was secondary power. Rights in secondary power were specified in the lease and the contracts, and the rate for it was set at .5 mill per k. w. h. The table in finding 8 shows the rights of the parties to firm and secondary power.

In the lease a concession was made to the City of Los Angeles and to Edison, that they would not, for the first three years that each was bound to pay for power, be obliged to take or pay for their full ultimate allotments at the firm power rate. It was provided that, for the first, second, and third years only 55, 70, and 85 percent, respectively, need be taken, and that if more than those percentages were in fact taken, the excess would be charged for only at the .5 mill secondary power rate. This was the "load-building period" privilege, which, as we shall see, the plaintiff claims it did not get, which claim is the basis for the suit in case No. 45688. This privilege was given to the Metropolitan Water District in its contract of April 26, 1930, which was also the date of the lease. It was not given to the 3 smaller cities, nor to the Gas Company, nor to the plaintiff, in their contracts made in the autumn of 1931. As we shall see, it was later given to all of the municipalities, and to the city of Los Angeles, as the successor to the Gas Company, but not, at least in the same form, to the plaintiff, though the Government urges that it was given to the plaintiff in substance.

Contracts adequate to reimburse the Government having been made, the Government proceeded with the building of the dam. As building progressed, the prospect was that the Secretary would announce the availability of 1,250,000,000 k. w. h. per year of power, which announcement would put into effect the obligation of the City of Los Angeles to begin to pay for its percentage of power, about June 1, 1937. The dam was expected to be completed in 1936. But all the water in the river could not be impounded while the depth necessary to generate 1,250,000,000 k. w. h. was built up, since

persons downstream had the right to a flow of some of the water for irrigation and other uses. Hence, some water would have to be released, and if it was put through the generating equipment, power not contracted for would be available. It was also expected that in the interval between each announcement and the succeeding one, water would be available to generate more power than the amount covered by the original contracts. As early as 1934 the City of Los Angeles, Edison, and the plaintiff applied to the Secretary for "interim" contracts to buy this power, when it should become available, at the .5 mill secondary power rate. The City objected to the plaintiff's getting any of it at that rate, because the plaintiff's "interim" would continue for some three years after the City began to pay the firm power rate of 1.63, and, the City claimed, the plaintiff was in competition with it at various points. A conference was held in Washington at which representatives of the City, the plaintiff, the United States Bureau of Reclamation and the Department of the Interior prepared and signed, on October 3, 1934, a "Memorandum of Understanding." See finding 10. This memorandum provided that the City should have an interim contract at the secondary rate until it became bound, under the lease, to take power at the firm rate; that the plaintiff should have a similar interim contract until it, in its turn, became so bound; and that the cities of Pasadena, Glendale, and Burbank should have load-building privileges. In the memorandum the City withdrew its objection to the plaintiff's receiving an interim contract. The Secretary never approved the agreement embodied in the memorandum, however, and the plaintiff never received an interim contract on the terms provided in the memorandum. On October 22, 1934, the City was given an interim contract to take power at the .5 mill rate from the time sufficient water became available until the time when it became bound to pay the firm power rate under the 1930 lease. On October 30, 1934, Pasadena and Burbank, and on November 1, Glendale, were given supplemental contracts giving them 3 year load-building periods similar to those given in 1930 to the City, Edison, and Metropolitan. These municipalities

were, as we have seen, to begin to take firm power at the same time as the City, so their load-building periods were to be concurrent with that of the City. The Secretary in 1934, 1935, and 1936, refused, though requested, to give the plaintiff either a load-building period, or an interim contract at the .5 mill rate.

In May 1937 the Secretary announced that 1,250,000,000 k. w. h. per year would be available June 1, 1937, thereby obligating the City of Los Angeles and the three smaller cities to begin to take power at the firm rate, as modified by the load-building privilege, from the latter date. The City's interim contract thus came to an end on May 31, 1937. On July 22, 1937, the plaintiff was given a supplemental or interim contract to be operative for the period of approximately 3 years which would elapse before the availability of the full 4,240,000,000 k. w. h. would be announced and the plaintiff's permanent contract would go into effect. This interim contract provided that the plaintiff should receive 114,280,000 k. w. h. the first year, and specified amounts slightly less than that for the second and third years, of "firm" energy at the 1.63 mills rate, and additional energy at the .5 mill rate. The contract designated the named amounts of energy as "firm" energy, but the energy was not "firm" within the meaning of that term as used in the lease, the other contracts and the regulations. It was completely subordinate to the rights of the City, though the prospect was that it would in fact be available and it turned out to be available for the three-year period. It was also subject in various ways to the will of the Secretary. This interim contract gave the plaintiff, for the interim period, the load-building concession which meant that only 55, 70, and 85 percent of the specified amounts of "firm" energy had to be taken and paid for at the 1.63 mills rate during the first, second, and third years, respectively, of the interim contract, amounts taken in excess of those percentages carrying only the .5 mill rate. The refusal to give the plaintiff a .5 mill rate for all power taken under its interim contract is, as we have said, the basis for its suit in No. 45916.

In No. 45688 the plaintiff's claim is based on the fact that it was not given a load-building period which would have

reduced the price of its power from 1.63 mills to .5 mill per k. w. h. for 45, 30, and 15 percent of the firm power which it took during the first, second, and third years of the period of its permanent contract, i. e., from June 1, 1940 to May 31, 1943. As appears above, all other parties to the lease and the contracts made in 1931 were given such a period. In support of its claim for equal treatment in this regard, the plaintiff cites the Boulder Canyon Act, 45 Stat. 1057, 43 U. S. C. 617, the Regulations issued by the Secretary of the Interior, the basic lease to the City and Edison, and the contracts with the plaintiff and others. Section 5 of the Act provided, in part:

> That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the * * * generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payment to the United States under subdivision (b) of Section 4. * * *
>
> General and Uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy. * * *

The Secretary's General Regulations, promulgated on April 25, 1930, after conferences with the municipalities and companies which were to take the power, provided for the making of the lease to the City and Edison; defined firm and secondary energy; fixed the rate per k. w. h. for each class of energy; allocated the energy among the lessees and allottees, and fixed the minimum annual obligations of each lessee and allottee. The lease, as we have seen, was dated April 26, 1930, and leased the generating machinery at the dam, some to the City of Los Angeles and some to Edison. It also, by its terms, made allotment contracts with the City and Edison, which incorporated the terms set out in the regulations. It provided in Article 14 (D) for the allocation of 6% of the power to a

list of municipalities, including Burbank, Glendale, and Pasadena, and in Article 14 (F) (ii) it required the City of Los Angeles to take and pay for so much of the energy allocated to the municipalities as they did not take and pay for. It provided in Article 14 (F) for the allocation of power to the plaintiff. The other contracts, including the one made with the plaintiff, also covered the subjects of allotments and rates, and a copy of the lease was attached to and made a part of each contract. Article 37 of the lease said:

> Any modification, extension, or waiver by the Secretary of any of the terms, provisions, or requirements of this contract for the benefit of any one or more of the allottees (including the lessees) shall not be denied to any other.

As we have seen, the lease granted the load-building period to the City and Edison, whereby each was, for the first, second, and third years of its contract excused from taking more than 55, 70, and 85 per cent of the agreed amount of firm energy at the 1.63 mill rate, and, if it took more than those percentages, got the excess at the .5 mill rate. The municipalities of Burbank, Glendale, and Pasadena, as well as the plaintiff and the Gas Company, were not given this concession in their original contracts made in the autumn of 1931. But, as we have seen, in the autumn of 1934, following the signing of the "Memorandum of Understanding," the Secretary made supplemental contracts with the three municipalities in which it granted load-building periods to them on the basis of the same percentages as those granted to the City and Edison. On October 22, 1934, as shown in finding 11, the Secretary made a contract with the City, excusing the City from its guaranty that the municipalities would pay for their allotments of power, to the extent that their allotments were to be reduced by the load-building period which they were to be given.

The plaintiff claims that it was entitled to a load-building period because that concession was made to the municipalities. It points to Article 37 of the lease, quoted above. It says that the supplemental contracts with the municipalities were modifications of the lease (1) because the lease was incorporated in and made a part of each of the original contracts

which were later modified, and (2) because the term of the lease itself, by which the City guaranteed to pay for the allotments of the municipalities at firm energy rates, if the municipalities did not pay, was modified by the contract of October 22, 1934, with the City. It also points to the fact that when, in 1938, the City became the assignee of the property and rights of the Gas Company, it on July 6, 1938, obtained a contract with the Secretary whereby, as such assignee of the Gas Company's contract with the Secretary, it was given a load-building period. The contract of July 6, 1938, which is quoted in finding 19, said that it was made to give the City, as assignee of the Gas Company, the same privileges given to other allottees on October 30, 1934, evidently referring to the supplemental contracts with the municipalities.

We think the plaintiff became entitled to a load-building period, when that concession was made to the municipalities and to the City as guarantor, and as assignee of the Gas Company. We think the lease and the contracts made with the allottees other than the lessees were intended to provide for equal treatment of the allottees, including the lessees, except as the lease and the original contracts which were contemplated by the lease, and into which the lease was incorporated, provided. The lease was modified when the requirement of its Article 14 (D) that the municipalities take 6% of firm power was reduced by the percentages of the load-building period, and when the requirement of its Article 14 (F) relating to the Gas Company was similarly reduced, for the benefit of the City as assignee. Its Article 14 (F) (ii) was modified when the City's guaranty to take or pay for the municipalities' allotment if they did not do so was reduced by the same percentages.

The Government argues that the lease was not modified by these concessions to other allottees, but, as we have indicated, we do not agree. The Government also urges that, whether or not the plaintiff became entitled to a load-building period, it received that concession, in its interim contract given it by the supplemental lease of July 22, 1937, shown in finding 17. By this lease it agreed to take specified quantities of power, during the interval of about two years and ten months

before the time when its original contract of 1931 would have required it to take power, and to pay the firm power rate of 1.63 mills for this interim power, except that any power taken by it in excess of 55, 70, and 85 per cent of the specified quantities, during the first, second, and third years, respectively, of the interim contract, would carry only the .5 mill rate. We think that the acceptance of this interim contract by the plaintiff did not destroy its right, under the lease and its original contract, to have a load-building period of three years from June 1, 1940, the date when it became obligated under its original contract to begin to take and pay for power. The contracts of the municipalities, and of the City as assignee of the Gas Company, were modified so as to give them load-building periods from the corresponding times in their contracts. We think that the Government has no right to set up, as to the plaintiff, something which, it claims, is the equivalent of, or practically as good as, the thing which it had expressly agreed that the plaintiff should have. The load-building period given to the plaintiff in its interim contract was not, we think, intended to be given as a substitute for one to which the plaintiff was entitled under Article 37 of the lease. As will appear from the discussion of No. 45916, a complicated set of circumstances led to the making of the interim contract. The right, which the plaintiff claims, accrued to it as a result of a statute, regulations of general effect, and contracts made by an authorized public officer. The effect of these acts and contracts was to fix schedules of rates and terms on which those entitled to power from the dam would get it. The Government, as the vendor of power, should not be permitted to change those schedules to the prejudice of the purchaser. We conclude, therefore, that in No. 45688 the plaintiff's claim to the benefits of a load-building period for the three years beginning June 1, 1940, is well founded.

No. 45916 is, as we have said, based upon the claim that all of the power which the plaintiff took under its interim contract of July 22, 1937, and for which it paid 1.63 mills, except for the percentages covered by the load-building period, for which percentages it paid .5 mill, should have carried the .5 mill rate because it was secondary power. The

plaintiff relies upon the Boulder Canyon Act, which, it contends, required that the power be disposed of under uniform regulations; the Regulations of the Secretary of the Interior, which set the rate of .5 mill for secondary power; the "Memorandum of Understanding" with the plaintiff and others, of October 3, 1934; the interim contract with the City of Los Angeles, of October 22, 1934, selling to it power which had express priority over the plaintiff's interim power, at the .5 mill rate; the "third circuit" contract with the City, of July 6, 1938, whereby the City was assured a specified amount of power, in addition to the firm power agreed to in its original lease, at the .5 mill rate; and the contract of October 14, 1938 with Edison whereby, without notice to the plaintiff, Edison was given a contract for unused firm power of the Metropolitan Water District at the .5 mill rate.

The Government's defense to this claim is, in substance, that the power available before the date of the first announcement which put the City's permanent contract into effect, and after each announcement but before the succeeding one, until the ultimate announcement of 4,240,000,000 k. w. h. of available power was made, putting the last of the contracts into effect, was power not covered by the Regulations or contracts, which the Secretary could refuse to sell at all, or sell on any terms he saw fit, and that the plaintiff is therefore bound by its contract to pay the agreed rates. As we have shown, the City and the plaintiff each applied for interim power. The conference of the interested parties with the agents of the Government produced the Memorandum of Understanding of October 3, 1934. That memorandum was intended as an agreement that various formal contracts would be made. All the contemplated contracts were made, except the one giving the plaintiff an interim contract, at the .5 mill rate. The City was given such a contract, and began to take power under it in October 1936, and ceased doing so on June 1, 1937, when its permanent contract began to operate.

The Secretary refused to approve an interim contract with the plaintiff on the terms provided in the Memorandum of Understanding. Further negotiations occurred in the succeeding years, and on July 22, 1937, an interim contract was made with the plaintiff. It leased to the plaintiff the gen-

erator which had been ordered by the Government in 1934, pursuant to the Memorandum of Understanding, and installed at a cost of $1,000,000, and required the plaintiff to pay its amortization and operating charges. It bound the plaintiff to take some 114,000,000 k. w. h. of power per year, designated the power to be taken as "firm" power, and fixed the firm power rate of 1.63 mills as the applicable rate. It granted the plaintiff a load-building period, for the interim, which meant that for power taken in excess of 55, 70, and 85 percent of the agreed amounts for the three successive years, the .5 mill rate would apply. The contract made the plaintiff's right to the release of any water for generating power subject to the conclusive determination of the Secretary that there was water available above what was needed for the fullest operation of equipment already or subsequently installed to serve the City of Los Angeles, or others having contracts for power. It provided that interim contracts might be made with others having contracts which did not yet entitle them to take power. Article 33 of the contract, quoted in finding 17, provided that if more favorable rates should be granted to any allottee or contractor, then the plaintiff should not thereafter be required to pay more than those rates. Article 33 was not, however, to apply to rates for the temporary resale of power allotted to the Metropolitan Water District.

The interim power which the plaintiff was entitled to under its contract was not "firm" power, as that term was used in the Regulations, lease, and contracts other than the interim contract. Firm power as defined was power which the Government agreed to deliver and the taker had the right to demand. The amount of firm power to be ultimately available had been conservatively estimated, so that the financing of the project would be sound, and it was always anticipated that there would be, in fact, a good deal more power than that which had been contracted for as "firm." The mere prospect or likelihood that power would be available was not, therefore, the basis of distinction between firm and secondary power. Yet the interim contract attached the label "firm" to the plaintiff's power, in contradiction of the use of the term in all other connections. The obvious purpose of the label was to justify the rate. The reason for the imposi-

tion of the rate was that the Secretary thought it would be unfair for the plaintiff to have the .5 mill rate for the three years before its permanent contract went into effect, while the City would be paying the full rate for a considerable percentage of its power.

The regulations, the lease, and the original contracts fixed the rates for firm and secondary power. We think they bound the Secretary, if he desired to market the power here in question, to charge the price for it which was applicable to its true nature. It was secondary power, because it was not agreed to be delivered, and was expressly made subject to the priorities of the City, and to being shared, if necessary, with others. The rate, set by public regulation and by agreement, applicable to secondary power, should have been applied to it.

The plaintiff asserts that, by Article V of the Regulations, Article (14) of the lease, and Article (7) of the plaintiff's original contract, which provided for the allotment of energy, it was entitled to a portion of the secondary energy at any time that such energy was available and was not taken by Metropolitan. If so, it was entitled to get it at the .5 mill rate set in the Regulations, lease, and contract for secondary energy. We think it was so entitled. A practical impediment to its getting it was, originally, that it would have no facilities for generating it until Edison took possession under its lease after 4,240,000,000 k. w. h. of energy were available. In fact the Secretary, by the plaintiff's interim contract of July 22, 1937, leased generating equipment to the plaintiff, thus making secondary energy available to it. But in the same contract, he labeled the secondary energy as "firm" and charged 1.63 mills for most of it. We think that, having made it available, he could not depart from the rate set in the Regulations, lease, and contract.

The so-called "third circuit" contract made by the Government with the City on July 6, 1938 is relied on by the plaintiff as bringing into play from that date the provision of Article 33 of the plaintiff's interim contract promising to it the benefit of any more favorable contract made thereafter. The City was proposing to build an additional transmission line, and desired to obtain additional power. By this contract the

Government agreed to supply 3,000,000,000 k. w. h. of additional power at the .5 mill rate during the period ending May 31, 1945. It also agreed to a formula for adjusting future rates for secondary power, the regulations, lease, and original contracts not having contained any provision for those rates.

We think that the third circuit contract, which gave the City a .5 mill rate for power, including interim power, which power, if secondary, yet had priority of right over the plaintiff's interim power, entitled the plaintiff under Article 33 to the .5 mill rate from July 6, 1938.

Edison's contract for firm power did not go into effect until June 1, 1940. The Metropolitan Water District had, in the original contracts, obligated itself to pay for 36% of the firm power generated at the dam. Its obligation was to begin when the Secretary announced the availability of 2,000,000,000 k. w. h., one year after the City's obligation became effective. In 1937 it was apparent that the 2,000,000,000 k. w. h. announcement would be made June 1, 1938. It had been expected from the beginning that Metropolitan would not, in fact, have use at least in the early years for its 36% of firm power, and the lease and contracts had provided that the Secretary might resell, for Metropolitan's account, what it did not use; that the City and Edison should each have an option to buy one-half of such power; that the plaintiff should have an option to buy 10% of Edison's one-half, and that if the Secretary proposed to sell such power he would notify the several parties having options. In 1937 the Secretary notified the parties, including the plaintiff, that he proposed to sell Metropolitan unused power, to begin June 30, 1938, at the 1.63 mills firm power rate. None of the parties exercised their options. On October 14, 1938, after the plaintiff had made its interim contract on July 22, 1937, the Secretary, without notice to the plaintiff, made a contract to sell Edison Metropolitan unused firm power at .5 mill. Failure to notify the plaintiff was a breach of the Government's contract giving the plaintiff an option to buy such power, and a right to notice when it was for sale. The Government urges that the plaintiff was not hurt by this alleged breach, since it had, by its interim contract, obligated itself to pay 1.63 mills for a specified amount of power, subject to the load-building con-

cession of a rate of .5 mill for all above 55, 70, and 85% of the specified amount in the first, second, and third years, hence would be getting at .5 mill all the power it was free to buy at a rate other than 1.63 mills. The plaintiff replies that what it was getting under its interim contract at .5 mill was secondary power, subject to the priority of the City and the will of the Secretary, while what it was entitled to buy of the unused Metropolitan power was firm power, subject to no prior right in anyone. The plaintiff suggests that the reason it was not notified of the proposed sale of unused Metropolitan power was that if it had entered into the negotiations to buy firm power at .5 mill the absurdity of its having been charged 1.63 mills, in its interim contract, for secondary power, would have been so apparent as to demand a revision of that contract. We think there is probable merit in the suggestion. The provision of Article 33 of the plaintiff's interim contract would certainly have been called into play by the sale to Edison, except that Article 33 expressly provided that it should "not be construed to apply to rates and charges fixed in contracts covering the temporary resale of electrical energy allotted to" Metropolitan. The plaintiff claims that because of the Government's breach of its contract to notify it of the sale of Metropolitan unused power, the Government lost its right to insist upon the proviso in Article 33. We do not see the force of this argument, and, since we have concluded above that the plaintiff was entitled to the .5 mill rate, it is not necessary to determine what effect, if any, the Edison transaction may have had upon the plaintiff's rights.

The Government urges, with regard to both suits, that whatever rights the plaintiff may have had to a load-building privilege or to a .5 mill rate for its secondary power, it lost those rights by voluntarily entering into its interim agreement. The plaintiff says that it did not make the agreement voluntarily, but made it as a result of economic duress. We agree with the plaintiff. We have found that it did all that it could to obtain an interim contract along the lines of the 1934 Memorandum of Understanding. It was apparent in 1937 that this could not be accomplished. It would not

have been prudent, even if it had been possible, for it in 1937 to have obtained other sources of needed power, since it was to become bound in 1940 to take power under its contract, hence other arrangements would have had to be temporary. The 1.63 mills rate of its interim contract was probably less than it would have had to pay elsewhere. The fact that the Gas Company, with which it had had exchange arrangements, was being taken over by the City, which was not friendly and was questioning the validity of the exchange arrangements, made it imprudent for it to depend greatly on that source of power. One who has a right to obtain a service from a public utility, for which service there is a charge fixed by law, cannot estop himself from challenging a higher charge by an agreement to pay it. To a degree, the extent of which it is not necessary to determine, the same doctrine is, we think, operative in this case, and, coupled with the economic duress to which the plaintiff was subject, it is sufficient to relieve the plaintiff of any waiver which might otherwise have resulted from its making of its interim contract. The Regulations, lease, and contracts made by the Secretary created a situation which contemplated and called for treatment of all parties on the basis of uniform definitions and rules. For him to change the defined meaning of terms, and make special applications of the rules to particular situations because he thought they called for special treatment, was, we think, a denial to the plaintiff of its rights under the Regulations and the contracts.

The plaintiff is entitled to recover in both cases. Judgment will therefore be entered for plaintiff in case No. 45688 in the sum of $82,172.54, and in case No. 45916 in the sum of $184,081.31. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

I do not think plaintiff is entitled to recover in either case. Under the original leases and contracts the plaintiff was not entitled to any power until 1940, when it was to take a part

of that to be generated by the Edison Company beginning in that year. It wanted it earlier and induced the defendant to lease to it generating equipment so it could generate its own current and so get it earlier than it could under its arrangement with the Edison Company. Defendant was under no obligation to do this; nor was plaintiff under any compulsion to take the power. The parties were free contracting agents.

They entered into a contract for power on precisely the same terms as the city's contract. The only difference was the city was entitled to get its power first; but this was immaterial because there was plenty for both parties.

No more has been charged plaintiff than it agreed to pay. There has been no discrimination, and, so, I do not think plaintiff is entitled to recover.

JONES, *Judge*, took no part in the decision of this case.

ALECK LEITMAN, TRADING AS LITE MANUFACTURING COMPANY, v. THE UNITED STATES

[No. 45498. Decided May 7, 1945. Plaintiff's motion for new trial overruled October 1, 1945]

On the Proofs

Government contract; telegraphic modification of lowest bid received after opening of bids.—Where plaintiff submitted to the Government a bid for the manufacture of helmet linings, and in the forenoon of the day the bids were to be opened plaintiff's representative, after making further calculations, concluded that the bid could be lowered, and thereupon sent two telegrams reducing the bid price, the telegrams not being received until after the opening of the bids; and where, without the telegraphic reductions, plaintiff's bid was the lowest; and where in the award to the plaintiff the Government stated the reduced price; and where plaintiff contended the award should be based upon the original bid price and that the later telegrams should be disregarded as erroneous; it is *held* that since plaintiff did not insist, before the award was made, that the telegrams be disregarded although he had ample opportunity to do so, the reductions were effective and plaintiff is not entitled to recover.

Same.—The rule that amendments to bids received after the opening are to be disregarded does not apply where the bid is already the lowest.

The Reporter's statement of the case:

Mr. William M. Aiken for plaintiff. *Messrs. Charles A. Horsky, Joshua Sprayregen* and *Covington, Burling, Rublee, Acheson & Shorb* were on the briefs.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, a citizen of the United States, is an individual trading as Lite Manufacturing Company and is engaged in business at 622 Broadway, New York, N. Y.

2. On June 28, 1940, defendant, through the Commanding Officer, Rock Island Arsenal, Illinois, issued circular advertisement for bids No. 741–40–1178 for the manufacture and delivery of leather helmet linings in accordance with the specifications therein set forth. The invitation called for separate bids per thousand helmet linings in blocks of 50,000 up to 400,000, and an additional block of 100,000 for quantities between 400,000 and 500,000. The time originally set for the opening of bids was 9:00 a.m. Central Standard Time, July 15, 1940, at Rock Island Arsenal, Illinois, but this was subsequently postponed until the same hour at the same place on July 25, 1940.

3. Accompanying the invitation to bid that was sent to plaintiff was U. S. Standard Form 22, "Instructions to Bidders." The Instructions to Bidders contained the following statement with respect to telegraphic bids under Article 11:

> Unless specifically authorized, telegraphic bids will not be considered, but modifications by telegraph of bids already submitted will be considered if received prior to the hour set for opening.

This was the only reference contained in the invitation to bid or the accompanying instructions with reference to telegraphic bids.

The invitation to bid provided that "all bids shall remain in effect for 30 days after the date of opening."

4. On July 23, 1940, and prior to the date set for the opening of the bids, plaintiff submitted a bid dated July 12, in accordance with the invitation and proposed to furnish helmet linings at prices commencing at $1,690 per thousand linings on quantities from 1 to 50,000, the price being progressively lowered by blocks of 50,000 linings to $1,440 per thousand linings on quantities between 400,000 and 500,000.

5. Plaintiff was assisted by an employee, Joseph Gurwin, in preparing the submitted bid. Gurwin was Aleck Leitman's first assistant, and his duties in general related to purchasing and the preparation of estimates for bids. Gurwin, with the knowledge and approval of Aleck Leitman, both in the original bid and in certified invoices subsequently submitted under the contract resulting therefrom, represented himself as manager of the Lite Manufacturing Company.

6. The original bid made by the plaintiff had been based on an estimate of 2⅓ feet of leather per helmet lining.

Early in the morning of July 25, 1940, the day that the bids were to be opened, Gurwin arrived at the office of the Lite Manufacturing Company and made some paper patterns of the helmet linings and laid them on some sample skins. After working with a dozen sample skins Gurwin came to the conclusion that he could cut a helmet lining out of two feet of leather. Gurwin thereupon sent the following telegram at 9:19 a. m. Eastern Standard Time:

> THE COMMANDING OFFICER
> RIA ROCK ISLAND ILLS
> RECIRCULAR 741-40-1178 HELMET LININGS REDUCE ALL PRICES SEVENTY DOLLARS PER THOUSAND
> LITE MFG CO

This telegram was received in the office of the Postal Telegraph Company, Rock Island, Illinois, at 8:35 a. m. Central Standard Time.

7. After sending the telegram quoted in the previous finding, Gurwin looked over the skins again and rechecked his calculations, and at 9:31 a. m. Eastern Standard Time, sent

a second telegram to the Rock Island Arsenal, which telegram was as follows:

COMMANDING OFFICER
ROCK ISLAND ARSENAL
ROCK ISLAND ILLS
RECIRCULAR 741—40—1178 HELMET LININGS CHANGE OUR TELEGRAPHIC REDUCTION OF SEVENTY DOLLARS PER THOUSAND ON ALL OUR PRICES TO ONE HUNDRED DOLLARS PER THOUSAND LITE MFG CO

The second telegram was received in the office of the Postal Telegraph Company at Rock Island, Illinois, at 8:55 a. m. Central Standard Time.

8. On the date of receipt of the telegrams the telegraph companies in Rock Island, Illinois, including the Postal Telegraph Company, were under instructions from the Rock Island Arsenal not to communicate telegrams to the Arsenal by means of the telephone but to deliver the same by messenger. Both of the telegrams quoted in the previous findings were delivered to the Rock Island Arsenal from the office of the Postal Telegraph Company in Rock Island, Illinois, at 10:40 a. m. Central Standard Time July 25, 1940, one hour and forty minutes after the time set for the opening of bids.

9. About three hours after Gurwin sent the two telegrams quoted in findings 6 and 7, Mr. Leitman arrived at the office, and Gurwin told Leitman about his calculations on the helmet linings and the two telegrams that he had sent. Between 2 and 3 o'clock p. m. of the same day and pursuant to instructions from Leitman, Gurwin went to the office of the Postal Telegraph Company in New York City, from which the telegrams had been sent, and requested a check of the time at which they were delivered at the Rock Island Arsenal.

On July 26, 1940, the next day, Gurwin was orally informed by the Postal Telegraph Company that both of the telegrams had been delivered to Rock Island Arsenal after the time set for the opening of the bids, and he communicated this information to Leitman.

10. Bids were opened at Rock Island Arsenal at 9 a. m. C. S. T. July 25, 1940. After making the abstract of the

bids it was necessary to send the same on to the Ordnance Department in Washington for final determination, as the bids on the helmet linings had been obtained on lots of 100,000 to 500,000 and Rock Island Arsenal did not know the quantity desired by the Ordnance Department.

On July 26, 1940, the Commanding Officer of Rock Island Arsenal sent the abstract of the bids to the Procurement Officer in Washington, D. C., accompanied by a letter which stated in part as follows:

> 1. In accordance with instructions contained in Production Order No. S-127 (dated June 26, 1940), Circular Advertisement No. 741-40-1178 was issued by this Arsenal to cover procurement of Helmet Lining Assemblies. Forwarded herewith is abstract of bids, together with bids, as received in response to this circular advertisement.
>
> 2. As far as can be determined at this Arsenal, the proposal of Bidder No. 5 (Lite Manufacturing Company, New York City) is the lowest bid, at $1,440 per thousand in quantities of from 400,001 to 500,000. In this connection, attention is invited to two telegrams of July 25, 1940, from the Lite Manufacturing Company, the first reading as follows:
>
> "Recircular 741-40-1178 helmet linings reduce all prices $70.00 per thousand."
>
> and the second as follows:
>
> "Recircular 741-40-1178 helmet linings change our telegraphic reduction of $70.00 per thousand on all our prices to $100.00 per thousand."
>
> These telegrams were received subsequent to the opening of the bids; but inasmuch as the Lite Manufacturing Company is the apparent low bidder, it is recommended that the Government take advantage of the above-mentioned reduced prices.

11. On July 26 or 27, 1940, Leitman called the Rock Island Arsenal by long distance telephone and talked to Joseph Curley, Chief of Procurement at the Arsenal. Leitman expressed the opinion to Curley that the telegrams had been sent in error but inasmuch as they did not reach the Arsenal in time, he was sure that they would not be considered. Curley told Leitman on the telephone that the telegrams might be taken into consideration because they were received in

Rock Island before 9 o'clock and that the Lite Manufacturing Company appeared to be the lowest bidder but the abstract of bids and pertinent documents were being sent to Washington for final determination.

Curley also called Leitman's attention to the fact that in the bid plaintiff had allowed only two days for acceptance and unless plaintiff extended this time the two days would not be sufficient and that Leitman's bid would probably be thrown out unless he extended the acceptance date. Leitman did not tell Curley that he wanted the telegrams to be disregarded.

12. Leitman was worried about the telegrams after his long distance telephone conversation with Curley at the Rock Island Arsenal, and on July 27th conferred with one of his employees, Arthur A. Gardner, relative to the helmet lining contract. Gardner's duties were that of contact man with the various Government agencies with which the Lite Manufacturing Company was doing business, and Leitman instructed Gardner to proceed to Washington to confer with the officials of the Ordnance Department regarding the award of the contract and the telegrams.

On Monday, July 29, 1940, Gardner arrived in Washington and contacted the office of the Chief of Ordnance, but found that the abstract of bids had not then been received in the Washington office from Rock Island.

13. On Tuesday, July 30, the papers were received and Gardner had a conference with General Drewry, who was then Chief of the Small Arms Division, and Mr. Frank J. Jervey, head Ordnance Engineer, Office of the Chief of Ordnance, about the helmet lining contract.

General Drewry showed Gardner the abstract of the bids which had been made at the time of opening at Rock Island Arsenal, and calculations to ascertain the low bid were made at the conference in the presence of Gardner, who assisted in the calculations. These calculations were necessary because the bidders had submitted prices on a sliding-scale basis and on various amounts or "blocks" of helmet linings. Computations had to be made to ascertain whether certain lows bids on a partial quantity when combined with other

bids on the remaining quantity would result in the minimum cost to the Government.

It was ascertained from these calculations that the plaintiff was the low bidder at his original figure of $1,440 per thousand helmet linings, on the number of helmet linings desired by the Ordnance Department, which was 428,045, and Gardner was thus informed at the conference.

14. The telegrams were not referred to nor discussed until Gardner was informed that plaintiff was the low bidder at the original figure. Gardner then explained that the telegrams were the result of errors made by plaintiff's employee Gurwin in calculating the amount of material required to make up a helmet lining and that they arrived too late at the Rock Island Arsenal, but he did not ask General Drewry to disregard them.

It was made clear to Gardner at the conference that the telegraphic modification of plaintiff's bid might be considered, but that, instead, all bids might be rejected and the contract readvertised, since plaintiff had specified that his bid should be accepted within two days, and this time had expired. Plaintiff's representative, however, stated that he did not want a readvertisement for bids, but would rather take the risk of loss, and he handed Jervey a letter dated July 29, 1940, signed by Leitman, extending the acceptance period, which letter read as follows:

> COMMANDING OFFICER,
> *Rock Island Arsenal, Rock Island, Illinois.*
> Re: Circular Advertisement #741-40-1178,
> opened July 25, 1940
> GENTLEMEN:
> As per our telephone conversation of July 26th, we herewith confirm the extension of our acceptance period on the above circular advertisement to August 5, 1940.
> Very truly yours,
> LITE MANUFACTURING CO.
> A. LEITMAN, *Prop.*

Defendant's representative then informed Gardner, plaintiff's representative, that he would be awarded the contract whether or not they took into consideration the telegraphic modification of the bid, since either way plaintiff was the low bidder.

15. Before Gardner left the conference, Jervey prepared a telegram for Rock Island Arsenal, which was submitted to General Drewry before it was sent. Gardner was not shown this telegram, which was as follows:

REFERENCE CIRCULAR ADVERTISEMENT NO. UXX 741–40–1178, ACCEPT LOWEST BID OF LITE MANUFACTURING COMPANY FOR 428,045 HELMET LINING ASSEMBLIES. WITH REFERENCE TO ACCEPTING $100 REDUCTION PER THOUSAND HELMETS, OFFERED IN LITE COMPANY'S TELEGRAM, RECEIVED AFTER OPENING BIDS, THIS MATTER WILL HAVE TO BE DECIDED BY LEGAL AUTHORITIES AND DECISION WILL BE SENT ROCK SLXX ISLAND ARSENAL AS EARLY AS POSSIBLE. LETTER FROM LITE MANUFACTURING COMPANY, EXTENDING ACCEPTANCE PERIOD TO AUGUST 5, 1940, LEFT IN THIS OFFICE BY REPRESENTATIVE, IS BEING MAILED ROCK ISLAND ARSENAL THIS DATE

DREWRY, *Lt. Col.*

16. Gardner then left the conference, called Leitman in New York on the long distance telephone and reported on the results of the conference, in substance that the computations made showed plaintiff to be the low bidder at the $1,440 price. He did not at any time report to Leitman that the War Department officials had agreed to disregard the two telegrams of July 25, 1940.

17. On July 31, 1940, the following telegram was sent to plaintiff from Rock Island Arsenal:

RECIRCULAR 40–1178 YOU ARE SUCCESSFUL BIDDER 428,045 HELMET LININGS STOP THIS TELEGRAM CONSTITUTES YOUR AUTHORITY TO PROCEED WITH MANUFACTURE ON ORDER 41–1525.

18. Between July 31 and August 10, 1940, six letters were written by plaintiff and his representatives to Rock Island Arsenal requesting information regarding details of the manufacture of helmet linings but no inquiry was made by plaintiff in any of these communications regarding the price at which the award had been made.

The plaintiff, Aleck Leitman, also personally visited Rock Island Arsenal between the dates of July 31 and August 10 and consulted with Mr. Curley there regarding the details of manufacture of the helmet linings. The subject of the contract price was discussed only casually between them.

19. On August 10, 1940, plaintiff received by mail from the Commanding Officer at Rock Island Arsenal a formal written contract for 428,045 helmet linings at the price of $1,340 per thousand.

The contract was returned unexecuted by plaintiff with a letter of August 13, 1940, which was as follows:

> Upon the receipt of your telegram in regard to the subject order, dated July 31, 1940, informing us that we were the successful bidder on the 428,045 Helmet Linings, and authorizing us to proceed with the manufacture on order no. 41–1525, we immediately took all steps necessary to manufacture and execute the order with all promptness and dispatch.
>
> We are now in receipt of Contract E741–ORD–5907 P. O. 41–1525, and notice that the contract price is $1,340.00 per M instead of $1,440.00 per M as per our regular bid submitted in response to Circular Advertisement. This, we presume, is due to our telegrams which you received after the set time for the opening of bids, and which were based on an error and miscalculation as it was explained by us to the authorities at Rock Island and Washington. The error was due to the fact that in rechecking our figures the morning before the opening of bids, we have erroneously assumed that we could cut complete leather linings from two (2) feet of leather. However, since then, we have definitely established that the least leather required for manufacturing a complete lining is 2¼ to 2⅓ square feet. Your own experience in manufacturing these linings will, we are convinced, substantiate our claim. Our visit to Rock Island Arsenal to watch the manufacture of the helmet linings with a view towards a possible saving on labor costs, has convinced us beyond any doubt that our hopes to save on labor costs are doomed to disappointment.
>
> In view of the fact that these erroneous telegrams were received by you after the set time for the opening of bids, we believe that they should be disregarded as we have requested, and the contract should be based on the original bid submitted by us and opened at the regular time.
>
> We have placed orders for materials and are proceeding with the organization of the work, and will make deliveries promptly as per bid.
>
> Enclosed you will please find bond of performance, and we would ask you to be good enough to send us

corrected contract as we are convinced that the modifying telegrams, having been based on error, and received by the government after the opening of bids when the regulations provide that such modifications could not be considered, ought to be disregarded in view of all the circumstances.

20. On August 15th the Commanding Officer of Rock Island Arsenal replied to plaintiff's letter, as follows:

> This will acknowledge receipt of your letter of August 13, with reference to the above-mentioned subject.
>
> In this connection, please note that during your representative's visit to this Arsenal, he was informed that the purchase order and contract covering the manufacture of these helmet linings would be written in accordance with the prices which your company quoted in your telegram. Your representative was further advised that it would be satisfactory for your company to submit to this Arsenal a letter (notarized, in quadruplicate), setting forth all details relative to the basis for the prices quoted in your telegram—this letter to be forwarded to Washington for proper action. Your representative was instructed that your company should take the above-mentioned action following completion of subject purchase order.
>
> Your acknowledgment of these instructions is requested.

Plaintiff replied on August 23rd as follows:

> We beg to acknowledge your letter of August 15, 1940, with reference to the above-mentioned subject. We note your statement that you had advised our representative that our company should submit to you a letter setting forth all details relative to the basis for the prices quoted in our telegrams, which will be forwarded to Washington, and that such action should be taken following completion of subject purchase order.
>
> We find it impracticable to follow the procedure outlined in your letter, because we would have difficulty in financing execution of the order if the settlement of the financial terms of the contract should be thus delayed. We have, therefore, sent our representative to Washington, in an endeavor to settle the terms of the contract definitely, now.
>
> The Contract Division of the Ordnance Department has advised us to transmit to the Chief of the Ordnance Department in Washington, all the papers in connection

with this matter, so that it may be considered now, which action we are at present taking.

We again beg to assure you that we are proceeding with the performance of the contract, and that there will be no delays in delivery dates.

21. Pursuant to plaintiff's letter of August 23rd, plaintiff then made efforts to obtain rulings from the Secretary of War and the Comptroller General of the United States that the true contract was based upon the original low bid of $1,440 per thousand and to secure a written contract at that figure. The Secretary of War was furnished with affidavits signed by Leitman, Gardner, and Gurwin dated August 28, 1940, about the facts of the case. By a letter dated September 27, 1940, the Secretary of War recommended that the contracting officer hold the plaintiff to the modified price and forwarded all papers to the Comptroller General for his decision.

On October 5th the Comptroller General issued a decision upon the statement of facts by the Secretary of War in his communication of September 27, 1940, holding that the amount to be paid to plaintiff for the contract work performed might not exceed the price in the original bid as reduced by the telegraphic modifications. This decision was based upon certain errors of fact in the Secretary of War's letter of September 27, 1940.

The matter was again submitted to the Comptroller General by the Secretary of War in a letter dated January 7, 1941, in which the Secretary corrected the errors in his original submission of the facts to the Comptroller General. On January 24, 1941, however, the Comptroller General affirmed his prior decision of October 5, 1940.

22. In the meantime plaintiff, without executing the formal written contract, had promptly entered upon the performance thereof, and up to December 31, 1940, had manufactured and delivered to defendant approximately 125,000 helmet linings. All such deliveries had been accompanied by invoices at $1,440 per thousand but no payment was made thereon.

About December 12, 1940, plaintiff telephoned the Arsenal regarding the delay in payments. On the same date, the following telegram was sent to plaintiff from the Arsenal:

RETELEPHONE CONVERSATION RAMSEY CONTRACT W741-ORD-5907, VOUCHERS BEING HELD BECAUSE INCORRECTLY BILLED STOP MUST HAVE CORRECTED VOUCHER ALSO SIGNED COPY OF CONTRACT BEFORE PAYMENT CAN BE MADE WIRE.

Plaintiff thereupon endeavored to borrow money from the Title Guaranty and Trust Company of New York in order to finance his operations under the contract, but a loan was refused until the contract had been signed and deposited with them as security, and an assignment to them of the payments due and to become due thereunder had been executed by plaintiff and approved by defendant.

23. The formal contract, bearing its original date of July 31, 1940, and duly executed by plaintiff, was received at the Arsenal on January 20, 1941, there being attached thereto the following:

> This document is signed under protest. The Undersigned Contractor maintains that he has entered into a contract with the War Department, under which he is entitled to be paid for the helmet linings at the rate of $1,440.00 per thousand. This document, which purports to embody an agreement under which the Undersigned Contractor is to be paid for helmet linings at the rate of $1,340.00 per thousand, does not embody the true contract between the parties as it now exists.
>
> The Undersigned Contractor is attempting now, and has been attempting with all possible diligence, to obtain from the War Department and other departments and agencies of the Government, action in accordance with his said contention. Up to this time the Undersigned Contractor has been unsuccessful in obtaining such action, and is now forced to sign this document, which does not embody the true contract between the parties, solely because he must obtain the payment for goods already delivered. Those sums are essential for the completion of the balance of the work.
>
> The Undersigned Contractor has also attempted to obtain partial payments without the necessity of signing this document and has been refused on the ground that no payments can be made unless a contract is signed.

> It is for this reason alone that the Undersigned Contractor has signed this document, and in so doing, the Undersigned Contractor does not in any way abandon or in any other respect disqualify himself from claiming the amount believed legally due under the true contract between the parties—at the rate of $1,440.00 per thousand helmet linings.

At the time of the signing of the formal contract by plaintiff January 20, 1941, plaintiff had manufactured and delivered approximately 210,000 helmet linings.

24. After the contract had been executed the helmet linings that had been delivered prior to that time were rebilled at the rate of $1,340 per thousand and all subsequent invoices were billed in the same amount.

All invoices sent to Rock Island Arsenal after execution of the contract had attached to them a protest, with the exception of the invoice dated January 23, 1941. The protest intended to accompany that invoice was sent separately with a letter under date of January 30, 1941. The form of protest attached to the invoices read as follows:

> This voucher is signed and submitted under protest. The Contractor maintains that he has a contract with the War Department, under which he is entitled to charge at the rate of $1,440.00 per thousand helmet linings. In submitting this voucher and accepting payment in accordance therewith, the undersigned Contractor does not in any way waive, abandon, or in any other respect disqualify himself from claiming the amount believed legally due under the true contract between the parties—payment at the rate of $1,440.00 per thousand helmet linings, as more fully set forth in the statement of protest executed simultaneously with and attached to said contract.

25. Plaintiff fully performed the contract by the delivery of 428,045 helmet linings within the contract period and has been paid at the rate of $1,340 per thousand for all linings so delivered.

The difference between the value of 428,045 helmet linings at $1,440 per thousand and the same number at $1,340 per thousand is $42,804.50.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit for the recovery of the difference in the price at which plaintiff offered in writing to furnish an amount of helmet linings and the price at which he agreed to furnish them in subsequent telegrams, sent before the time for opening the bids, but received thereafter.

The defendant, through the Commanding Officer, Rock Island Arsenal, Illinois, invited bids for helmet linings in blocks of 50,000 up to 400,000 and an additional block of 100,000 for any amount that might be ordered between 400,000 and 500,000. Bids were to be opened at 9:00 a. m. on July 25, 1940.

On July 23, 1940, plaintiff submitted a bid of $1,690 per thousand for linings on quantities up to 50,000, the price being progressively lowered for blocks of 50,000 down to $1,440 per thousand for quantities amounting to between 400,000 and 500,000. In making this bid plaintiff had figured that it would require 2⅓ feet of leather for each helmet lining. But early in the morning of the day the bids were to be opened plaintiff's representative made further calculations of the amount of leather necessary to be used, and having concluded that less than 2⅓ feet per helmet would be required, he sent the Commanding Officer of the Rock Island Arsenal a telegram reducing all prices by $70.00 per thousand, and still later he sent another telegram reducing the prices by $100.00 per thousand.

The first telegram was sent at 9:19 a. m. Eastern Standard Time (8:19 a. m. Central Standard Time—Rock Island is on Central Time). The second telegram was sent at 9:31 a. m. Eastern Standard Time (8:31 a. m. Central Standard Time).

The first one was received in the office of the Postal Telegraph Company at Rock Island, Illinois at 8:35 a. m. Central Standard Time, and the second one was received at its office at 8:55 a. m. Central Standard Time. However, they were not received at the Rock Island Arsenal until 10:40 a. m. Central Standard Time, an hour and forty minutes after the time set for the opening of the bids.

Plaintiff arrived at his office at about 12:00 o'clock on the morning of July 25, 1940, when he learned of the sending

of the telegrams. Two or three hours later he inquired at the Postal Telegraph office as to the time the telegrams had been delivered. The following day the telegraph company informed him that they had been delivered at 10:40 a. m. on July 25. On that day or the following day Leitman called the Rock Island Arsenal by long distance telephone and stated to Joseph Curley, the Chief of Procurement at the Arsenal, that he thought the telegrams had been sent in error, but that he assumed they would not be considered since they had arrived after the time for the opening of the bids. Curley told him that they probably would be considered since it appeared on the face of the bids that plaintiff was the low bidder, but that all papers had been sent to Washington for final determination of the low bidder and the question of whether or not the telegrams would be considered.

Plaintiff did not withdraw his telegraphic offer nor demand that they not be considered. However, he did send to Washington Arthur A. Gardner, his contact man with Government agencies. Gardner conferred with General Drewry and Frank J. Jervey, head Ordnance Engineer, and together they made computations to determine the low bidder. At this time Gardner made no demand that the telegrams be disregarded, but after he had been advised that plaintiff's written bid was the lowest, he then said that the telegrams were based upon an erroneous calculation and that they had arrived after the time for the opening of the bids. He did not, however, even at this time, demand that they be disregarded. Instead, upon being advised by defendant's representatives that the two-day limit for acceptance of plaintiff's bid had expired and that, therefore, it was possible to reject all bids and readvertise, Gardner stated that plaintiff would prefer to run the risk of loss rather than to have a readvertisement. Gardner thereupon handed defendant's representative a letter signed by plaintiff, dated July 29, 1940, extending the period for acceptance until August 5, 1940.

Plaintiff's bid was accepted by telegram on July 31, 1940, and 428,045 helmet linings were ordered. The price to be

paid was not stated in defendant's telegram because the Department in Washington had under consideration the question of whether or not plaintiff's telegrams should be considered.

On August 10, 1940, plaintiff received a formal written contract for 428,045 helmet linings at the price of $1,340.00 per thousand, which was the price stated in the last telegram. At no time prior thereto had plaintiff ever demanded that the telegrams be disregarded, although he had had several conferences with Curley, the Chief of Procurement at Rock Island, and, through his representative, with the Department in Washington. However, upon receipt of this contract plaintiff protested that his telegrams were based upon an error, that they had been received too late, and that the contract should be based upon the original bid. He stated, however, that he had placed his orders for materials and was proceeding to carry out the contract, but requested that a new contract based upon the prices stated in the original bid be sent to him for signature.

Defendant refused to modify the price and refused to pay plaintiff for deliveries until the original draft of the contract had been signed and vouchers based upon the prices stated therein should be submitted. Since plaintiff was unable to borrow the money to finance the carrying out of the contract, and in order to secure payment from the defendant for deliveries made, plaintiff on January 20, 1941, executed the contract upon the basis of the prices stated in the last telegram. He did this, however, under protest, claiming that he was entitled to a contract upon the basis of the prices stated in his original bid. Subsequent to the execution of the contract plaintiff submitted vouchers upon the basis of the prices stated therein, but all of these were submitted under protest.

Had there been no advertisement for bids in this case, but had the defendant asked only the plaintiff to submit an offer to furnish it with these helmet linings, and had plaintiff first submitted an offer in writing and then modified it by the two telegrams which he sent, there would be no doubt

that plaintiff would have been obligated to furnish the linings at the price stated in the last telegram.

Plaintiff never withdrew the telegraphic modification of his bid. He allowed the offer to stand, without protest, until it had been determined that he was the low bidder anyway. Then, and only then, did his representative, whom he had sent to Washington, state that the offer made in the telegrams had been based upon a miscalculation. We have no doubt that plaintiff wanted the telegrams to be considered if this was necessary in order to make him the low bidder. Only when he learned that he was the low bidder did he intimate that he would like to have the telegrams disregarded, and, even then, when the suggestion was made that there might be a readvertisement, he did not demand that the telegrams be disregarded, but said he would prefer to run the risk of loss. His offer to furnish the helmet linings at the prices stated in the telegrams remained in effect up until the time that he was notified that he was the successful bidder and that the contract would be awarded to him. When he received this notification he still did not demand that the telegrams be disregarded, although he had been notified that they might be taken into consideration in determining the price to be paid. The offer remained in effect until accepted.

If plaintiff is to be relieved from the offer made in the telegrams, it is only because of the provision of a War Department regulation, which was included in the instructions to bidders. This reads as follows:

> Unless specifically authorized, telegraphic bids will not be considered, but modifications by telegraph of bids already submitted will be considered if received prior to the hour set for opening.

Manifestly, the reason for the condition placed upon the consideration of a telegraphic modification was to put all bidders on an equal basis and to prevent any bidder from obtaining an advantage over others by permitting him to modify his bid after securing information as to other bids submitted. *United States* v. *Brookridge Farm*, 111 F. (2d)

461, 463; 21 Op. A. G. 547–548. Therefore, where the bid submitted in time is the low bid, the reason for the rule against considering telegraphic modifications of it after the time for the opening of the bids does not exist, and in such case the rule should not be applied.

The limitation on the consideration of telegraphic modifications was not for plaintiff's benefit but to prevent plaintiff from obtaining an unfair advantage. If defendant, therefore, elects to consider a telegraphic modification received after the time for the opening of the bids, plaintiff cannot complain, nor can the other bidders, because plaintiff was already the low bidder.

There can be no possible reason why a low bidder cannot voluntarily decrease the amount of his bid. Plaintiff did decrease the amount of his bid before he had any information as to other bids submitted, and even after he learned that he was the low bidder he did not withdraw his offer. Even when he was advised that the time for acceptance of his offer had expired, and when, therefore, he could have withdrawn his bid with impunity, he did not do so, but extended the time for acceptance so as to make it a binding offer.

Plaintiff's defense that there was a mistake in his calculations, upon the basis of which the telegrams were sent, cannot be sustained. No showing whatsoever was made to support his statement that there had been a miscalculation.

Plaintiff's offer to furnish the linings at the prices stated in his last telegram remained in full force and effect until accepted by the defendant; plaintiff, therefore, was bound to furnish the linings at the price stated therein. He has been paid this price and, therefore, is not entitled to recover. His petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THOMAS LEE CAUSBY AND WIFE, TINIE CAUSBY v. THE UNITED STATES

[No. 46054. Decided June 4, 1945. Defendant's motion for new trial overruled October 1, 1945]*

On the Proofs

Eminent domain; taking, what constitutes; airplane flying over plaintiffs' land.—Where an airport adjacent to plaintiffs' chicken farm was leased by the Government for the use of its military airplanes, which at times passed over plaintiffs' property at a low height in taking off from and landing at the airport; and where it is found that the chickens were frightened by the airplanes passing over at low levels so that their fertility was greatly decreased, and some of them were so frightened that they flew blindly against the buildings and were killed; and where, on that account, the business of plaintiffs became unprofitable and the chicken farm was abandoned; it is *held* that plaintiffs are entitled to recover for damages to their property from the taking of an easement over it.

Same; ownership of air above surface of land.—The common law doctrine that an owner of land also owns all that lies beneath the surface and all the space above it has received substantial modification since the advent of the airplane. Nevertheless there can be no doubt that today a landowner owns the air space above his land as completely as he does the land itself or the minerals beneath it, at least insofar as it is necessary for his complete and full enjoyment of the land itself.

Same; trespass by frequent flights above plaintiffs' property.—Where it is shown by the evidence adduced that the defendant's airplanes have many times traversed the air space above the property of plaintiffs at such altitudes, and the planes being of such a character as to interfere seriously with plaintiffs' use and enjoyment of their property, even to such an extent as to make it necessary for them to abandon it as a chicken farm, and it is shown that defendant intended to do so at will; it is *held* that defendant has thereby taken an easement in plaintiffs' property and plaintiffs are entitled to recover.

Same; continued trespass may amount to a taking.—A trespass upon the property of another does not ordinarily constitute a taking but if it is sufficiently frequent, or if there is otherwise shown an intention to continue it at will, such continued trespass or intention amounts to a taking, if the owner's use and enjoyment of his property are thereby destroyed or impaired. *Hurley* v.

*Defendant's petition for writ of certiorari pending.

Kincaid, 285 U. S. 95, 103; *Jacobs* v. *United States*, 290 U. S. 13, 16; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327.

Same; permanent or temporary use of space above plaintiffs' property constitutes a taking.—Whether or not the defendant intended to appropriate unto itself a permanent or a temporary right to use the air space over plaintiffs' land, there was nevertheless a taking of it. *A. W. Duckett & Co.* v. *United States*, 266 U. S. 149, and other cases cited.

Same; evidence of permanent or temporary taking.—Where the defendant reserved the right to renew its lease on the airport adjacent to property of plaintiffs for a limited period, it cannot be inferred from that alone that the defendant intended to appropriate this easement unto itself only temporarily.

Same; permanent appropriation of easement.—Where it is shown that the defendant asserted the right to have its planes fly over plaintiffs' property at altitudes as low as suited its necessities and whenever it chose to do so; it is *held* that the defendant appropriated this easement unto itself permanently, not temporarily, and that the plaintiffs are entitled to recover, if at all, on this basis.

Same; constitutional provision as to taking private property valid in war as in peace.—The plaintiffs are entitled to recover under the constitutional provision that private property shall not be taken without just compensation, whether the taking occurred in time of war or in time of peace.

Same; basis of recovery.—Plaintiffs are not entitled to recover for the damage to their business but they are entitled to recover the special value of the land due to its adaptability for use of this business. *Joslin Co.* v. *Providence*, 262 U. S. 668, 675; *Mitchell* v. *United States*, 267 U. S. 341; *Dominion Smelting & Refining Corp.* v. *United States*, 102 C. Cls. 281.

Same; plaintiffs entitled to recover value of property destroyed, the value of the easement taken, and the damage to the remainder of the property as a result of the taking of the easement; jury verdict arrived at.—Upon the evidence adduced, a judgment in the nature of a jury verdict is rendered in the sum of $2,000.00, as the value of plaintiffs' property destroyed and of the easement taken and the damage to plaintiffs' property resulting from the taking of this easement.

The Reporter's statement of the case:

Mr. William E. Comer for the plaintiff.

Miss Mary K. Fagan, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs, Thomas Lee Causby and Tinie Causby, his wife, are residents of the State of North Carolina, and own Lot No. 32 in the "Lindley Subdivision," Friendship Township, Guilford County, North Carolina, containing 2.8 acres, subject to a mortgage lien in the amount of nine hundred dollars in favor of C. O. Meredith of Greensboro, North Carolina. On this land are the following improvements:

A six-room painted, frame dwelling house with a bath and hot and cold water, one 20 x 20 two-story chicken house with automatic water system, built on concrete with metal roof and painted, one 20 x 32 combination chicken house, one brooder house, ceiled, with shingle roof, one 20 x 20 one-story chicken house, with water and connections in all the above, one feed house, 10 x 10, one garage, two rain shelters, two summer sheds, some hog houses and hog lots, and a wire fence, one well and pressure water system.

Plaintiffs purchased this property in 1934, the improvements were completed in 1937 and plaintiffs and their family have lived there continuously since 1937 up to the present time, except approximately two months early in 1944. The property consists of a strip of land measuring on the south on Federal Highway No. 421, approximately 100 feet, and extends north of equal width approximately 1,200 feet to property of one Boren. The property is located about eight miles west of the City of Greensboro, North Carolina. Plaintiffs' chief business was operation of a chicken farm of considerable volume on the property and raising chickens for breeding purposes. The improvements are in fairly good state of repair.

2. The Greensboro-High Point Municipal Airport Authority operates an airport covering a considerable acreage of land, under and by virtue of an enabling Act of the North Carolina Legislature, passed in 1941. The airport was activated in April 1942. It is located about eight or nine miles west of the City of Greensboro, North Carolina, on Federal Highway No. 421. The present Authority is the successor in title to the property from some former Authority as to which the proof is unsatisfactory.

3. In 1927 or 1928 there was a landing field on the site of the present airport with a wooden hangar and small administration building. A weather bureau was established during that early period. The field was used by civilians who flew the planes in use at that time. It is not shown at what definite time later the field developed into an authorized airport, but from 1927 or 1928 the site has been in continuous operation for airplanes, and for a long time prior to the execution of the lease to the defendant, mentioned in finding 5, it was an authorized airport, use of which was made by mail planes, commercial airliners, and civilian planes.

During the year 1939 extensions were made to one or both runways, but no hard-surface extensions have been made since that date. There was no control tower for directing the operation of planes prior to July 1943. Traffic was not heavy until the present war.

4. Located on and forming a part of the airport and the airport property are two runways. One runway, designated as the northeast-southwest runway, is 150 feet in width and 4,000 feet in length. The other runway designated as the northwest-southeast runway is 150 feet in width and 3,370 feet in length. These runways are both asphaltic concrete pavement runways.

5. On May 11, 1942, a lease was entered into by and between the Greensboro-High Point Airport Authority and the United States of America, which contained the following provisions:

> 2. The Lessor hereby leases to the Government the following-described premises, viz: the Greensboro-High Point Airport, plat of which is hereto attached, marked "Exhibit A," and made a part of this lease. It is understood and agreed that the full, exclusive and unrestricted use of same by the Government shall be exercised concurrently, jointly, and in common with the Lessor and its tenants. It is further agreed and understood that the Lessor leases to the Government the present steel hangar located on said airport property, and ten acres of land, more or less, adjoining the said hangar, for the exclusive use of the Government. The said hangar and ten-acre tract of land, more or less, is designated by red lines on the plat marked "Exhibit

A." However, it is understood and agreed that the Lessor retains the right of ingress, egress, and regress for the purpose of servicing and inspecting the water pump which is located on said tract of land, to be used exclusively for the following purposes (see instruction No. 3) : Requirements of the War Department.

The term for which the lease was given commenced June 1, 1942, and ended June 30, 1942, with provision for renewal until June 30, 1967, or six months after the end of the present national emergency whichever shall first occur. The lease has been renewed and is in operation.

The United States erected a hangar barracks and other operational buildings on the ten acres adjoining the airport property which it leased from the Authority, and it controls the military operations of the defendant at that airport.

The United States also acquired by title in fee among other parcels of land an aggregate of 38.04 acres at the southeast end of the northwest-southeast runway for the purpose of eliminating flying hazards. The 38.04 acres is cleared and seeded.

Lying between the tract of 38.04 acres at the end of the northwest-southeast runway and plaintiffs' property are three tracts aggregating 74.62 acres which have not been acquired by the United States.

6. On July 27, 1943, the Civil Aeronautics Authority, Department of Commerce, placed a manager at the airport for administration of traffic control and installed a control tower with employees also under Civil Aeronautics Authority, Department of Commerce. Since that date all air traffic is controlled from the tower. Instructions for landing and taking off are given to all planes taking off or landing except such planes as are without radio. These instructions relate to the available runway, wind direction and velocity, etc. Records are kept of all planes landing and taking off. Military aircraft are required to land on and take off from the paved, hard-surface runways and not from the seeded area. All operations of the airport, other than on the ten acres leased exclusively to the United States, are controlled by the Greensboro-High Point Airport Authority.

7. The wind direction and velocity are material governing factors in directing planes in regard to the particular run-

way to use in landing and taking off from the airport. For this airport what is known as a "windrose" or a calculation of the prevailing wind direction was prepared by the U. S. Weather Bureau from its records. This windrose indicates that because of the prevailing winds over the northwest-southeast runway near plaintiffs' property this runway would be used approximately 4% of the time in taking off and 7% of the time in landing.

8. Planes using the airport are classed as air liners, civilian itinerant, civilian local, and military. The military bombers are heavy, four-motored planes; ten percent of the military traffic is of the heavy four-motored bomber type. The transport planes are approximately the same weight as commercial airline planes. The fighter planes are lighter.

The following tabulation indicates the use of the airport by aircraft and the figures represent the two plane movements of coming in and leaving. The actual number of planes, in each instance, is one-half of the figures given:

Date	Air liner	Civilian itinerant	Civilian local	Military	Monthly total
August 1943	242	289	2, 584	1, 576	4, 691
September 1943	226	111	4, 082	1, 384	5, 803
October 1943	256	115	3, 647	1, 598	5, 656
November 1943	238	162	3, 336	1, 750	5, 486
December 1943	232	147	3, 892	1, 542	5, 813
January 1944	200	149	6, 220	1, 647	8, 216
February 1944	184	112	854	1, 552	2, 702
Total 7 months' period	1, 578	1, 125	24, 615	11, 049	38, 367

9. The distance from the end of the paved portion of the northwest-southeast runway to the barn on plaintiffs' property is 2,220 feet; to the highest tree thereon it is 2,230 feet; and to plaintiffs' dwelling house it is 2,275 feet. The elevation of the runway is between 5 and 6 feet above the elevation of plaintiffs' property. Plaintiffs' house is approximately 16 feet high, his barn is approximately 20 feet high, and the tallest tree is approximately 65 feet high.

The safe glide angle for planes landing or taking off at this airport, approved by the Civil Aeronautics Authority, is a 30 to 1 glide angle, which means one foot of elevation or descent for every 30 feet of horizontal distance.

The path of glide of aircraft taking off from or in landing upon the northwest-southeast runway is directly over plaintiffs' property. Computed on the basis of 30 to 1 glide angle the top of plaintiffs' barn is 63 feet below the glide angle; the top of the dwelling is 67 feet below it, and the top of the highest tree is 18 feet below the glide angle, which the Authority regards as a safe glide angle. Not infrequently defendant's planes passed over plaintiffs' property at approximately these heights. On some occasions the backwash from the propellers blew the dead leaves off the trees.

The heavy, four-motored military planes in landing and taking off over plaintiffs' property necessarily came closer to the 30 to 1 glide angle than the lighter planes which usually rise to and reach a higher angle.

10. Since July 1943 the records show four accidents as having occurred at or in the vicinity of the airport:

A Navy plane fell about 2½ miles northeast of the airport September 13, 1943. This plane ran into a house and five persons were killed.

A Navy plane fell approximately one mile away at the Lindley Nursery place. The pilot was killed.

A Navy Beech aircraft landed on southwest runway with its wheels up October 28, 1943.

An Army aircraft failed in its attempt to take off and ran into a ditch.

11. The proof shows that prior to the time that the United States began operations at the Greensboro-High Point Authority Airport in May 1942 the greater proportion of planes landing and taking off from the airport were civilian planes, being light aircraft. Mail planes sometime prior to that date inaugurated mail service. These planes are much lighter than the heavy four-motored Army and Navy planes. The angle at which these planes (except an occasional military plane) passed over plaintiffs' home and property was relatively high and not such as to cause plaintiffs serious concern.

Since the United States began operations about May 1942, its four-motored heavy Army and Navy bombers, the fighter and certain other planes of the heavier type, in taking off

from and landing at this airport, have frequently passed over plaintiffs' property, their house, and chicken houses both day and night and, at times, in considerable numbers rather close together. They come close enough at times to appear to barely miss the tops of trees on the property and at times close enough to the tops of the trees to cause the old leaves on the trees to fly off. The noise so close to the buildings is startling and at night the glare from the planes brightly lights up the immediate area.

The planes became more numerous after the Army began its operations and this situation has been continuous since that date. There is no evidence of an intention to use or of an intention not to use the airport for its heavy bombers after the termination of defendant's lease, other than the fact that defendant has the right to renew its lease only until six months after the end of the present emergency or until June 30, 1967, whichever date is the earlier.

12. The result of this situation, together with knowledge of the accidents that have occurred, is that the plaintiffs and their family have become nervous and frightened. At night they are frequently deprived of sleep. The peace and comfort of their home are seriously interfered with. Their property, for the same reason, has depreciated in value.

13. The proof shows that plaintiffs conducted a commercial breeding chicken farm from which they made a living. At first they had leghorn chickens, but this breed reacted so badly to the noise and glare of the planes that plaintiffs got rid of the leghorns and purchased another breed, which at first appeared to react better, but as the planes increased in number, with the attendant distraction, this breed also reacted badly and production fell off. Plaintiffs have picked up at times as many as 6 to 10 chickens a day killed by flying into the walls from fright caused by the planes. Plaintiffs have lost as many as 150 chickens killed in this manner. Plaintiffs finding themselves losing money gave up the chicken business. Chickens that had cost approximately $2.50 each to hatch and raise for production purposes were sold on the market for $1.50 each. This situation has destroyed the use of the property as a commercial chicken farm.

14. The value of plaintiffs' property that was destroyed and the value of the easement taken, together with the damage to the remainder of plaintiffs' property as a result of the taking of the easement, is $2,000.00. [The date of the taking of the easement was June 1, 1942.] [1]

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue for the alleged taking by the defendant of their home and chicken farm which was adjacent to the Greensboro-High Point Municipal Airport. This airport was operated under an enabling Act of the North Carolina Legislature. It was used by commercial airliners, by private planes, and by military aircraft. The defendant used it under a lease which permitted its military airplanes to land on and take off from it, and to use one of the hangars on it and to have the exclusive use of 10 acres of land adjoining the hangar.

One of the runways on which the planes landed and took off ran in the direction of plaintiffs' home and chicken farm, so that planes using this runway passed directly over plaintiffs' property. All planes, both private and military, used this runway when the wind was blowing from a certain quarter.

Plaintiffs say that most of the planes using it passed over their house harmlessly at relatively high altitudes, but that the heavier of the military planes passed over it at so low an altitude as to seriously interfere with their possession and enjoyment of their property. They say that the chickens on their chicken farm lived in such a state of fright that their fertility was greatly decreased, and that on frequent occasions they became so frightened that they blindly flew against the buildings and were killed. As a result they say they have had to sell their remaining chickens and abandon their property as a chicken farm. They also say that they themselves live in a state of constant uneasiness and that they are unable to sleep at night due to the noise of the planes passing

[1] Amended October 1, 1945.

over their house and to the glare of their lights. They continue, however, to occupy the property as a home.

The proof shows that plaintiffs' barn is 2,220 feet from the end of the paved portion of the northwest-southeast runway, the tallest tree is 2,230 feet from it, and plaintiffs' house is 2,275 feet from it. The elevation of plaintiffs' property is from five to six feet below that of the runway.

According to the rules and regulations of the Civil Aeronautics Authority, the ideal glide angle is not less than 30 to 1. This means that there must be no obstruction more than a foot high 30 feet from the end of the runway, and that the height of any obstruction must not exceed 1/30 of its distance from the end of the runway. This angle of glide is supposed to be safe under the worst conditions. The highest tree on plaintiffs' property is 18 feet below this glide angle, plaintiffs' barn is 63 feet below it, and plaintiffs' house is 67 feet below it. Not infrequently defendant's planes passed over plaintiffs' property at approximately these heights. On some occasions the backwash from the propellers blew the dead leaves off the trees.

Plaintiffs' testimony that the fertility of their chickens was so decreased, and that so many of them were killed as a result of fright that their business became so unprofitable that they had to abandon it, is not disputed; nor that the value of the property has greatly decreased. Nor is it disputed that all planes used the runway which passed over plaintiffs' property when the wind was blowing from a certain direction, nor that the defendant intended to continue to do so as long as it continued to use the airport. The defendant does say that this runway was used only from 4 to 7 percent of the time, but it does not deny that it intended to continue to use it whenever the wind blew from a certain quarter, so long as it continued to use the airport.

The term of the lease began on June 1, 1942, and ran for a period of thirty days, but with the privilege of renewal until June 30, 1967, or until six months after the end of the present national emergency, whichever date was the earlier. It is still in force and defendant continues to use the airport.

The question is whether or not the passage of defendant's planes over plaintiffs' property at the stated heights above it,

with the result stated, and its intention to continue to have them pass over it for an indefinite period, constitutes a taking.

Under the old common law doctrine of *cujus est solum ejus est usque ad coelum et ad inferos* a landowner not only owns the surface of his land, but also owns all that lies beneath the surface even to the bowels of the earth and all the air space above it even unto the periphery of the sky.

Under this doctrine any erection over the land of another, or any passage through the air space above it, is a trespass. So, if an adjoining landowner allows the eaves of his house to extend beyond his own property and over the land of another he has committed a trespass. Broom's Legal Maxims, 310; *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5, 10; *Ackerman, et al.* v. *Ellis*, 81 N. J. Law, 1, 79 Atl. 883. A telephone or telegraph company which stretches its wires over the land of another without permission is guilty of a trespass. *Butler* v. *Frontier Telephone Co.*, 186 N. Y. 486, 491; 79 N. E. 716. The shooting of guns over another's land is also a trespass, although the bullets do not land upon it. *Whittaker* v. *Stangvick, et al.*, 100 Minn. 386, 111 N. W. 295; *Restatement of the Law of Torts*, sec. 159.

However, especially since the days of airplanes, this common law doctrine has received substantial modification. But even so, there can be no doubt that today a landowner owns the air space above his land as completely as he does the land itself or the minerals beneath it, at least insofar as it is necessary for his full and complete enjoyment of the land itself. So, he may erect buildings on his land to any desired depth or height, subject, of course, to necessary police regulations, and, subject, of course, to the right of eminent domain, he may prohibit the erection over it of any structures of any character or the passage over it of anything that interferes with his right to light, air, view, or the safe and peaceful occupation and enjoyment of his land. *Smith* v. *New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385, 69 A. L. R. 300; *Delta Air Corporation* v. *Kersey*, 193 Ga. 862, 20 S. E. (2d) 245; *Restatement of the Law of Torts*, sec. 194; *Pollock on Torts* (13th Ed.) p. 362; *Burdick's Law of Torts* (4th Ed.) 406; Act of May 20, 1926, c. 344, 44 Stat. 568, 574, sec. 10; 49 U. S. C. 180. Cf. *Northwest Airlines* v. *Minnesota*,

322 U. S. 292; *Hinman, et al.* v. *Pacific Air Transport Corp.*, 84 F. (2d) 755.

Under the facts of this case there can be no doubt that defendant has committed numerous trespasses upon plaintiffs' property. It has traversed many times the air space above their property at such an altitude and with planes of such a character as to seriously interfere with plaintiffs' use and enjoyment of their property, even to such an extent as to make it necessary for them to abandon it as a chicken farm.

A trespass upon the property of another, however, does not ordinarily constitute a taking, but if it is sufficiently frequent or if there is otherwise shown an intention to continue it at will, such continued trespasses or intention may amount to a taking, if they destroy the owner's use and enjoyment of his property. *Hurley* v. *Kincaid*, 285 U. S. 95, 103; *Jacobs* v. *United States*, 290 U. S. 13, 16; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327.

The case last cited was before the Supreme Court on three different occasions. Its first opinion was in a case styled *Peabody* v. *United States*, 231 U. S. 530; its second in *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1. Under the facts in the two former opinions the Supreme Court held that there had not been a taking. The case reported in 260 U. S. 327, came before the court upon a demurrer which had been sustained by this court. The facts stated in the petition were that the defendant had erected a fort on a strip of land immediately to the west of plaintiff's land and that it had planted guns therein which could be fired only over plaintiff's land; that a fire control tower had been erected for the firing of these guns, and that the defendant intended to fire them across plaintiff's land at will, with the result that it had been deprived of the use and enjoyment of its property. Of such a case the court said:

> * * * There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that

"if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." 231 U. S. 538. That proposition we regard as clearly sound. The question is whether the petition before us presents the case supposed.

* * * * *

If the United States, with the admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose. * * *

The court held that the petition, alleging the facts set out above, did state a cause of action and our judgment sustaining the demurrer was reversed.

We think the case at bar is controlled by that case. In that case there had been no invasion of the land itself, and defendant had fired its guns across it but twice, but there was alleged an intention to fire over it at will, with the result that plaintiff had been deprived of its profitable use as a summer resort. Here there have been frequent invasions of the air space above plaintiffs' land, and the evidence shows an intention to continue these invasions whenever the wind blows in a certain direction. As a result plaintiffs have been deprived of the use of their property as a chicken farm.

In both cases, to paraphrase the Supreme Court's opinion in *Peabody* v. *United States*, *supra*, reiterated in *Portsmouth Harbor Land & Hotel Co.* v. *United States*, *supra*, a servitude has been imposed on the property which constitutes an appropriation of it. It was not a complete appropriation in

either case, it is true. In both cases there was a taking only of the air space above plaintiffs' property, but this resulted in damage to the remainder of the property; and it is well settled that a plaintiff may recover not only the value of the part of his land which has been taken, but also the damage to the remainder resulting from the taking of a part of it. *Bauman* v. *Ross*, 167 U. S. 548, 574; *United States* v. *Grizzard*, 219 U. S. 180.

But it is said that in the case at bar the evidence indicates that the defendant did not intend to permanently appropriate to its own use this easement over plaintiffs' property since it reserved the right to renew its lease on the airport only until June 30, 1967, or six months after the end of the present national emergency, whichever date was earlier. Whether or not the defendant intended to appropriate unto itself a permanent or a temporary right to use the air space over plaintiffs' land, there was nevertheless a taking of it. *A. W. Duckett & Co.* v. *United States*, 266 U. S. 149; *Brigham* v. *Edmands*, 7 Gray (Mass.) 359; *McKeon* v. *New York, New Haven & Hartford Railroad Co.*, 75 Conn. 343, 53 Atl. 656, affirmed in a *per curiam* opinion in 189 U. S. 508; *Cavanagh* v. *Boston*, 139 Mass. 426, 1 N. E. 834; *Paine* v. *Savage*, 126 Maine 121, 136 Atl. 664, 51 A. L. R. 1194; *Steinhart* v. *Superior Court*, 137 Calif. 575, 70 Pac. 629; *Cape Girardeau* v. *Hunze*, 314 Mo. 438, 284 S. W. 471, 47 A. L. R. 25; *Norwood* v. *Sheen*, 126 Ohio State 482, 186 N. E. 102, 87 A. L. R. 1375. All of these cases are authority for the proposition that there has been a taking within the meaning of provisions of a constitution similar to the Federal Constitution entitling the owner to recover just compensation, although the taking is only temporary. Cf. *United States* v. *General Motors Corp.* 323 U. S. 373.

But we cannot conclude from the mere fact that the defendant reserved the right to renew its lease on the airport for a limited period, 25 years, or less if the national emergency did not last so long, that defendant intended to appropriate this easement unto itself only temporarily. Upon the expiration of its current lease on the airport defendant no doubt intended to make some sort of arrangement whereby it could

use the airport for its military planes whenever it had occasion to do so.

At any rate, it seems clear to us that the defendant asserted the right to have its planes fly over plaintiffs' property as low as the stated heights whenever it chose to do so. We, therefore, think that the defendant appropriated this easement unto itself permanently, not temporarily, and that the plaintiffs are entitled to recover, if at all, on this basis.

The defendant also says that it is not liable because plaintiffs' land was taken, if at all, in the conduct of military operations in time of war, and for such a taking the defendant is not liable. This is quite clearly erroneous. The plaintiffs are entitled to recover under the constitutional provision that private property shall not be taken without just compensation. This provision has the same validity in time of war as in time of peace. The Constitution is not set aside in time of war. Indeed, the restraints of that instrument are especially necessary when our ordinary respect for the rights of others is often consumed in the hot fire of the passions aroused by war.

Plaintiffs are not entitled to recover for the damage to their business, but they are entitled to recover the special value of the land due to its adaptability for use for this business. *Joslin Co.* v. *Providence*, 262 U. S. 668, 675; *Mitchell* v. *United States*, 267 U. S. 341; *Dominion Smelting & Refining Corp.* v. *United States*, 102 C. Cls. 281.

From all the testimony, we have concluded that the value of the property destroyed and of the easement taken and the damage to plaintiffs' property resulting from the taking of this easement is the sum of $2,000.00. A judgment in the nature of a jury verdict will be rendered for this amount. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting:

I am unable to agree with the decision of the court for several reasons.

First. The court awards the plaintiffs $2,000, one-half the value of their property. This award can be justified only by

assuming that the activities of the Government which are the basis for this suit are to be carried on permanently. There is no basis in the evidence for such an assumption. The Government's lease on the airport is to terminate six months after the end of the present national emergency. When the lease terminates, the plaintiffs' property will be just as useful and just as valuable as it was before the Government leased the airport in 1942. The plaintiffs will have their property, unimpaired, and also one-half of its value. Just compensation for a partial impairment of value for what will probably be about four years' use does not amount to one-half of the fee value of the property. After the Government has paid the judgment, it will have no way of recouping the money which it has been obliged to pay for a permanent right which it does not want and has no expectation of using. It will have nothing to sell, since the privilege of flying military planes at low altitudes over the plaintiffs' property could be of no use to anyone but the Government.

Second. I think that the Government has the right, at least in wartime, to have its military planes fly through the air space over a landowner's land, when the flights are at safe altitudes and are no more frequent than they were in this case. There is no question here of danger of physical contact with the plaintiffs' property. By recognized standards, the glide angles for even the heaviest of planes were such that they easily cleared the plaintiffs' buildings and trees. The Government's activities at the airport were conducted with great care, so that, in fact, the plaintiffs' property was no more subject to peril of physical contact than that of the countless persons throughout the country over whose homes planes fly at various heights. The harm to the plaintiffs' property resulted from the noise of planes, and, to a slight degree, from the lights of the occasional night flying planes. These annoyances are real, and may diminish the value of property. But all those whose property lies near a railroad, or a highway, or a street car line, suffer from these annoyances in varying degrees, and practically always without compensation, even though the owner of the annoying enterprise is a private or municipal corporation which is fully subject to suit.

When railroads were new, cattle in fields in sight and hearing of the trains were alarmed, thinking that the great moving objects would turn aside and harm them. Horses ran away at the sight and sound of a train or a threshing machine engine. The farmer's chickens have to get over being alarmed at the incredible racket of the tractor starting up suddenly in the shed adjoining the chicken house. These sights and noises are a part of our world, and airplanes are now and will be to a greater degree, likewise a part of it. These disturbances should not be treated as torts, in the case of the airplane, any more than they are so treated in the case of the railroad or public highway.

Third. Assuming that what the Government did was a legal wrong, I do not think that it was a taking of the plaintiffs' property. If not, the constitution and the statute defining our jurisdiction give the plaintiffs no right to recover. The nature of the court's judgment, an award of one-half the value of the property, would indicate that the compensation is for damage done to the property, rather than for taking it. The plaintiffs still have the property, and will have it after the judgment. They will also have, of course, the amount of the judgment. The court's method of resolution of this seeming contradiction is to say that the Government has taken, not the property or one-half or any part of it, but an easement in or through it. Then, the reasoning goes, the damage to the property may be appended to the interest taken, and thus included in the award made for the taking. I recognize that if the Government takes a part of a man's land, and the effect of the taking is to damage the part not taken, as, for example, by depriving it of access to a road, the incidental damage may be recovered in the suit for the taking.

The court's conclusion that an easement of flight was taken is, I think, erroneous. As I have said, I think the Government had the privilege, at least during the war, of making the flights which it has made. If so, it needed no granted easement and cannot be regarded as having taken one by doing what it had the right to do. And if it did not have the right to make the flights, I have difficulty in determining the nature of the easement which it took and should pay for. If

the flights were, as the court's opinion must assume, trespasses, they would, if the defendant were an ordinary litigant, be the subject of a damage suit for past damages, and an injunction against repetition. But the fact that an ordinary person had committed trespasses on the plaintiffs' land in the past would not give the plaintiffs a right to sue the trespasser as if he had taken the land, or an easement in it, and make him pay the permanent value of the land or the easement. There is no such doctrine of the conversion of land to one's own use by taking liberties with it, as there is in regard to personal property. Hence the plaintiffs could get no such remedy against a private defendant as they are being given here. It seems then as if the court is, by way of compensation to the plaintiffs for the fact that the Government is not suable in tort, giving them a remedy against the Government by way of compensation for property taken, which in its nature, and especially in the amount of the recovery, differs completely from any remedy the plaintiffs might have against a private litigant.

There might be justification for this stretching of legal doctrine if there was any showing of an intention on the part of the Government to make permanent use of the plaintiffs' land. But, as I have said, the Government's lease on the airport ends six months after the end of the war. Hence it is having a permanent easement forced upon it which it has no use for and should not be obliged to pay for. In the case of *Portsmouth Harbor Land and Hotel Co.* v. *United States*, 260 U. S. 327, the court held that if the Government's installation of a coastal defense battery was with the intent of maintaining it there in time of peace, and firing projectiles across the plaintiff's land whenever it chose to do so, that would constitute a taking for which compensation should be made, but if it was merely placed as a defensive measure in time of war, it would not constitute a taking. This decision supports the idea which I have expressed above that the Government is privileged to carry on activities in wartime which may be harmful to land owners, which activities would not be privileged in time of peace. But I suppose it also shows the court's reluctance to saddle upon the Government the burden of paying the permanent value of land or interests in land for

which it has no desire or use, it merely needing the use for the temporary period of the emergency. I think, therefore, that if the court concludes that the Government's repeated trespasses amount to the taking of an easement, it should award compensation for that easement, and for the incidental damage to the land, only down to the time of judgment, and should retain the case for the award of further compensation when the Government's use of the airport, and its easement, terminate at the end of the war. In this way the court could avoid compensating the plaintiffs in an amount several times as great as any loss which they will, in all probability, suffer.

JONES, *Judge*, took no part in the decision of this case.

J. F. BARBOUR & SONS v. THE UNITED STATES

[No. 46090. Decided November 5, 1945]

On Defendant's Demurrer

Government contract; defendant not liable in damages for delays caused by its acts as sovereign.—Following the decision in the case of *Gothwaite* v. *United States*, 102 C. Cls. 400, it is *held* that the Government is not liable in damages for delays in performance of contracts caused by the exercise of its general and public acts as a sovereign. See also *Horowitz* v. *United States*, 58 C. Cls. 189; 267 U. S. 458.

The Reporter's statement of the case:

Mr. William E. Carey, Jr., for plaintiff.

Mr. Fred B. Rhodes, and *Rhodes & Rhodes* were on the brief.

Mr. Kendall Barnes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The facts sufficiently appear from the opinion of the court.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff and defendant, acting through the Federal Works Agency, entered into a contract March 25, 1942, in which plaintiff agreed for the lump sum of $266,722.22 to furnish the necessary materials and labor, and to perform

all the work necessary for the construction of a community hospital at a Defense Housing Project at Radford, Va. The contract provided for completion of the building within 210 calendar days after notice to proceed, or by November 9, 1942.

Recovery of damages of $30,000 is sought on the ground that defendant, through actions of the contracting officer and officials of the War Production Board, breached the contract by causing extended delays and stoppages of work due to "the failure of defendant to grant plaintiff the necessary authority [priority orders] to secure the required materials."

The petition alleges in substance as follows:

1. At the time the contract was entered into plaintiff was led to believe that defendant desired the building completed within the time named in the contract and that the defendant would do nothing to prevent completion of the building within the time named. Acting upon such belief, plaintiff promptly moved all its building equipment to the site of the proposed building and began construction work on April 17, 1942.

2. At a later date it became necessary, in order to continue with the work, to have certain priority orders issued by the War Production Board for certain necessary materials and when these priority orders were not granted the matter was promptly presented to defendant and, thereupon, defendant made an investigation on June 11, 1942. Thereupon the work on the project was ordered temporarily stopped by representatives of the Public Building Administration, Federal Works Agency.

3. The rules for obtaining priority orders were the same on the date the contract was made as they were on the later dates that plaintiff sought priority orders. In order to enable plaintiff to obtain the necessary priority orders it was necessary that the agency of the Government, which contracted with it, take action to obtain such orders through the War Production Board, the rules and regulations of which forbade plaintiff dealing with anyone except the owner of property for which a priority rating was required. Between the date of the contract and the date work on the project was ordered stopped, plaintiff made constant demand on its contracting agency to furnish it with proper priority pref-

erence and, by letters, telegrams, telephone calls, and personal conferences, negotiated therefor with the contracting agency and with the War Production Board. Under priority regulations the work called for by plaintiff's contract was in a class for which priority orders might be issued. The needed materials were available for purchase by plaintiff if adequate priority orders had been obtained by plaintiff and the contracting officer from the War Production Board, and such materials could have been acquired by plaintiff more promptly than they were obtained under inadequate priority ratings.

4. Paragraph 14 of the contract specifications provided as follows:

> PRIORITY RATING.—Bidders are advised that a project priority rating will be applied to this project after the award of the contract and this project rating will be extended to the Contractor.

By reason of the stoppage of work upon the various occasions due to the inability of plaintiff and the contracting officer to secure adequate priority orders for the necessary materials, the work on the building became in a thoroughly disorganized condition. Footings and trenches which had been prepared for the cement work became flooded with water, and other damages and losses were incurred. Plaintiff was also required to employ a large number of employees and supervisors, without being able to furnish them with any work to perform. The delay and inability to proceed with the work also tied up a large amount of plaintiff's equipment which was urgently required for other work.

The stoppage of work and the delay in orderly and prompt completion thereof were caused by failure of the War Production Board, which controlled the granting of priority orders, to grant plaintiff the priority authority necessary to enable it to obtain the required materials and to proceed with the work without delay and the increased costs which were occasioned by such delay.

Defendant's demurrer to the original petition was sustained. *J. F. Barbour & Sons* v. *United States*, 364,

decided October 2, 1944, and an amended petition was filed in which paragraph 3 above, not included in the original petition, was added.

We are of opinion that this case is, in principle, the same as the case of *Everett D. Gothwaite*, v. *The United States*, 102 C. Cls. 400, 401, in which defendant's demurrer to the petition was sustained on the ground that the United States is not liable in damages as for a breach of contract through delay in its performance when such delay was the result of an act of the Government in its sovereign capacity.

Plaintiff does not allege that the contracting officer, or the officials of the War Production Board responsible under acts of Congress for the issuance of priority ratings and priority orders, failed to act or acted arbitrarily or capriciously. Plaintiff and the contracting officer appear to have done what they could under the circumstances to obtain the best priority rating and priority orders from the War Production Board. There was no provision in the contract that any particular priority rating would be granted for this project, or that plaintiff would be granted such priority orders as would enable it to complete the building within the contract period of 210 days. Plaintiff's claim that defendant breached the contract by delaying the work and causing it to be stopped is based upon the allegation that an inadequate priority rating and inadequate priority orders were granted. But under the National Defense acts and the War Powers acts, enacted by Congress (see Title III, sec. 301, Second War Powers act of March 27, 1942, 56 Stat. 176, 178), full authority was vested in the President to be exercised through such agency as he might appoint "to allocate materials essential to the National defense and to give priority in the obtaining of such materials to contractors engaged in work connected with the National Defense," *Gothwaite* v. *United States*, *supra;* and in view of this, which it must be held plaintiff's contract contemplated, it cannot be said that the delay and increased cost which resulted from the priority rating that was granted constituted a breach of contract such as would render the United States liable in damages.

For the reasons stated and on authority of *Gothwaite* v.

United States, *supra*, and the cases therein cited, defendant's demurrer must be sustained, and the petition is dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this demurrer.

Opinion on Original Petition

In an opinion rendered October 2, 1944, defendant's demurrer to plaintiff's original petition was sustained and the petition dismissed in an opinion holding that the petition did not contain allegations necessary to state a cause of action, as follows:

MADDEN, *Judge*, delivered the opinion of the court.

The Government has demurred to the plaintiff's petition. The petition alleges that on March 25, 1942, the plaintiff made a contract with the Government to construct for it the Radford Community Hospital, for the price of $266,722.22, the work to be completed on or before November 9, 1942; that at the time the contract was entered into the plaintiff was led to believe that the Government would do nothing to prevent the completion of the work within the time set; that, acting upon that belief, the plaintiff promptly moved its equipment to the site and began work on April 17, 1942; that at a later but unspecified date it became necessary in order to continue with the work to have certain priority orders issued by the War Production Board in order to obtain certain necessary materials; that when these priority orders were not granted, the matter was promptly presented to the Government which on June 11, 1942, made an investigation; that thereupon the work on the contract was ordered temporarily stopped by representatives of the Public Buildings Administration, Federal Works Agency; that by reason of this stoppage the work became disorganized, trenches prepared for concrete work became flooded with water, the plaintiff was unable to keep its supervisors and workmen busy, and the plaintiff's equipment, which was urgently needed for other work, was tied up on this job; that by reason of the delays caused by the

stoppage of the work and the failure of the Government to grant the plaintiff the necessary authority to obtain the required materials, the plaintiff was damaged to the amount of thirty thousand dollars.

The Government's demurrer is based upon the doctrine, elaborated in the case of Everett D. Gothwaite, No. 46080, decided this day, that when the Government, in its capacity as a sovereign, places obstacles in the way of the performance of a contract with it, it does not thereby become liable in damages for a breach of its contract [See 102 C. Cls. 400].

The plaintiff urges that this doctrine should not apply to its case because the Government, by setting a date for completion of the contract, must have determined that the work was essential and entitled to such priority orders as would be necessary to get it done within the fixed time; and that if it was essential, the Government should have so certified, which would have enabled the plaintiff to get the priority orders for the necessary materials.

The plaintiff does not in its petition allege that the rules for obtaining priority orders were the same at the time the contract was made as they were at the later unspecified date when it sought the priority order; that any action by anyone on behalf of the agency of the Government which contracted with the plaintiff was necessary to enable the plaintiff to obtain the needed priority orders; what efforts, if any, the plaintiff made to obtain the priority orders; whether in fact, under the priority regulations, it was entitled to priority orders; whether the needed materials were available for purchase so that if the plaintiff had had priority orders it could have obtained the needed materials more promptly than it did obtain them. In the absence of information upon any of these subjects, we must, without even reaching the issue presented in the *Gothwaite case*, *supra*, conclude that the plaintiff's petition does not state a cause of action, and it is therefore dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

DAVID J. McMAHON v. THE UNITED STATES

[No. 45778. Decided October 1, 1945]

On the Proofs

Suit for overtime where only minimum hours were stipulated in contract.—Where plaintiff was employed on a Government project at a stated monthly salary "on a full-time basis or a minimum of 160 hours per pay-roll month;" and where plaintiff worked on a full-time basis and was on duty more than half of the 24-hour day and his working days included Saturday and Sunday; it is *held* that the 160 hours of work stipulated in his contract was a minimum and plaintiff is not entitled to recover for overtime pay.

Same; act on which claim is based must be specified in pleadings.—Rule 11 of the Court of Claims requires a petitioner, in the event his claim is founded upon an act of Congress, to specify in his petition "the act and the section thereof on which plaintiff relies."

Same; deficiencies in pleadings.—The court may not always supply and remedy major deficiencies in pleadings.

The Reporter's statement of the case:

Mr. David J. McMahon, in propria persona.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. A project under the National Youth Administration was established at Burlington, Vermont, during May 1940, and the plaintiff, David J. McMahon, 63 years of age, and a citizen of the State of Vermont, was employed by the National Youth Administration, as shown by a letter dated April 30, 1940, addressed to him from Allan R. Johnston, State Youth Administrator, which reads as follows:

> Effective May 2, 1940, you are appointed Chef on Work Project 35, Burlington, Vermont, at a monthly salary of $100.00. You are to be employed on a full-time basis or a minimum of 160 hours per pay-roll month.

2. Plaintiff's compensation remained at $100 per month until November 1, 1940, on which date it was raised to $125 per month and remained at that rate until March 6, 1941, when plaintiff was separated from the service.

3. During the month of May 1940, plaintiff was engaged in assisting the supervisor of the project in ordering supplies

and kitchen equipment for the commencement of the project, under the direction of Leon Spurling, project director. He worked on a schedule of 44 hours per week during May 1940.

4. The project, called Pomeroy School, opened on June 1, 1940, and plaintiff, in addition to his work as chef or cook, was directed to and did act as dietician and instructor to two classes of boys in cooking and baking, one class in the morning and another in the afternoon. Plaintiff came on duty at six o'clock in the morning and prepared breakfast. He prepared dinner at noon and supper at five thirty o'clock in the afternoon. After supper plaintiff's duties consisted of putting away the equipment and seeing that supplies were safely locked up, all of which kept him on duty until approximately seven thirty in the evennig. This was with the knowledge of Mr. Spurling, director of the project. Plaintiff was on duty approximately 13½ hours per day or more than 90 hours per week from June 1, 1940, to August 30, 1940. Plaintiff had assumed that his hours of work would continue to be 44 per week during this period.

5. The Burlington project was moved to Camp Smith, at Waterbury, Vermont, which process of moving continued from August 31, 1940, to October 15, 1940. During this period plaintiff assisted in the removal of the supplies and equipment to the new location, and worked a 44-hour week of 5½ days.

6. From October 15, 1940, to February 10, 1941, plaintiff worked at the Camp Smith project in Waterbury, performing the same duties as at Burlington. An assistant, Mr. Campbell, was assigned to him, but the proof shows that plaintiff worked from six a. m. until seven thirty p. m., or until the dishes and equipment were safely put away and supplies locked up. This amounted to 13½ hours per day, or more than 90 hours per week during the period indicated.

7. Plaintiff claims pay for overtime, at time and a half, for the two periods, viz. (1) While engaged on the project at Burlington, Vermont, for the period from June 1 to August 30, 1940; (2) While engaged on the project at Waterbury, Vermont, from October 15, 1940, to February 15, 1941.

8. Time reports for personal services of employees were kept by the National Youth Administration during the periods involved, among which are shown the time records of

the plaintiff. These reports, except the last one, severally cover semimonthly payroll periods. The first two semimonthly payroll reports, being for the month of May, 1940, indicate that plaintiff worked the full month, less one day, May 1, but do not show the number of hours worked. The remaining semimonthly reports, covering the period from June 1, 1940, to March 6, 1941, are intended to show a schedule of working days and hours and the hours actually worked. The time reports to August 15, 1940, are authenticated by the timekeeper and the project supervisor. Those from August 15, 1940 to February 15, 1941, are authenticated by a certifying officer and also by plaintiff. Those from February 16, 1941, to March 6, 1941, do not contain the signature of Mr. McMahon, the plaintiff, and cover the time he was on leave with pay.

9. The proof shows that plaintiff was in "pay status" during the entire period of his employment and was on duty during all the days and hours for which he was scheduled to work during the two periods involved.

Plaintiff actually worked until February 10, 1941. He was placed on annual-leave status effective February 11, 1941, and continued on the payroll until March 6, 1941, when his leave period expired.

10. Defendant's time reports and earnings records for plaintiff disclose the following:

Period of time	Number of days	Number of hours	Amount paid
1940			
May 2 to May 15, inclusive	14		$46.67
May 16 to May 30, inclusive	15		50.00
June 1 to June 15, inclusive		82	50.00
June 16 to June 30, inclusive		78	50.00
July 1 to July 15, inclusive		71	50.00
July 16 to July 31, inclusive		92	50.00
Aug. 1 to Aug. 15, inclusive		85	50.00
Aug. 16 to Aug. 31, inclusive		89	50.00
Sept. 1 to Sept. 15, inclusive		78	50.00
Sept. 16 to Sept. 30, inclusive		85	50.00
Oct. 1 to Oct. 15, inclusive		85	50.00
Oct. 16 to Oct. 31, inclusive		92	50.00
Nov. 1 to Nov. 15, inclusive		78	62.50
Nov. 16 to Nov. 30, inclusive		67	62.50
Dec. 1 to Dec. 15, inclusive		78	62.50
Dec. 16 to Dec. 31, inclusive		85	62.50
1941			
Jan. 1 to Jan. 15, inclusive		78	62.50
Jan. 16 to Jan. 31, inclusive		92	62.50
Feb. 1 to Feb. 15, inclusive		82	62.50
Feb. 16 to Feb. 28, inclusive	[1]	[1]	62.50
Mar. 1 to Mar. 6, inclusive		31	24.40

[1] Full time on leave.

The foregoing reports show that plaintiff was scheduled to work and did work 497 hours during the 3-month period from June 1 to August 31, 1940, and 652 hours during the 4-month period from October 16, 1940, to February 15, 1941, or on average of 164 hours per month, during those two periods.

Defendant's time reports show no hours scheduled or work performed for any Sundays or legal holidays during the aforesaid periods of plaintiff's claim. The evidence shows that plaintiff actually worked daily throughout the period in performing the work required of him.

The time reports do not accurately set forth the "hours actually worked" by plaintiff during the aforesaid periods.

11. Plaintiff was paid semimonthly on a calendar month basis. At the rate of $100 per month, calculated on the minimum of 160 hours per month, his regular pay rate would be 62.5 cents, and time and one-half rate would be 93.75 cents per hour.

At $125 per month, plaintiff's hourly pay rate is calculated at 78.125 cents per hour, with time and one-half rate at $1.171875 per hour.

12. Plaintiff complained orally to the project director, Mr. Spurling, about the long hours that he was having to work; but made no written protest or complaint until in February 1941.

13. Plaintiff accepted all semimonthly payments, including those from September 1, 1940, signed by him, without written protest.

14. Under date of February 14, 1941, Mr. Allan R. Johnston, State Youth Administrator, advised plaintiff as follows:

> Reference is made to your letter of February 13th. You were placed on annual leave effective Tuesday, February 11th, and at the termination of your leave you will no longer be carried on the payroll of this Administration.
>
> I have been advised by the Finance Division that you will receive your salary for all of the month of February and for 5⅔ working days in March. This will make the formal termination of your employment effective about March 10th.

15. Under date of May 2, 1941, Allan R. Johnston, State Youth Administrator, wrote plaintiff as follows:

> There has been referred to me from the office of Dr. Mary H. S. Hayes, Director of the Division of Youth Personnel in Washington, a copy of your letter of March 24th to Madam Perkins, Secretary of Labor, and more recently a copy of your letter of April 24th to Dr. Hayes, in reference to compensation for overtime hours of employment with this Administration.
>
> You will recall that at our meeting here in Montpelier I did not offer you much encouragement, but that I would take the matter up with Washington officials and if there were any provisions for payment of cases of this nature I would recommend that you be reimbursed, provided proof could be established of actual hours of overtime. I took this matter up with the proper officials at a recent meeting in New York City and was informed that there were no provisions for payment of overtime services.
>
> You will also recall that at the time your services were terminated that you were kept on the pay roll until the expiration of your accrued leave. Regulations provide that the granting of annual leave upon termination of employment is optional with the State Youth Administrator. The fact that annual leave was granted, irrespective of the reasons for termination of your employment, it would seem that this Administration had taken all steps possible to compensate you for services rendered.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff here appears for himself and not by attorney. Effective May 2, 1940, he was appointed by the National Youth Administration as chef on a work project at Burlington, State of Vermont, at a monthly salary of $100, and, as stated in the notice of appointment: "on a full-time basis or a minimum of 160 hours per pay-roll month."

In the course of his employment he was sent to another project, in the same capacity, at Waterbury, Vermont. While at his new post his salary was increased to $125 per month. He was separated from the service March 6, 1941.

The validity of his separation from the service is not in issue, nor are the base rates of $100 and $125 per month for

salary. What the plaintiff is claiming is extra compensation for excessive time he put in, extra compensation at the rate of time and a half. He does not complain of what he terms a 44-hour schedule, which was in effect for part of the time, and did exceed 160 hours per month, or 40 hours per week.

The plaintiff was cook, dietician, class instructor for the boys in camp. Boys' appetites extend into Saturdays and Sundays, embrace a three-meal schedule, and we are satisfied with the plaintiff's account of his overtime. The pay rolls show no work done on Sunday and only a half-day's work or no work on Saturdays, contrary to plaintiff's testimony, and hunger recognizes no holiday. The pay rolls are not to be relied upon.

However, when we look to the terms of employment, we find that the time of "160 hours per pay-roll month" (or 40 hours per week) was stated expressly as a "minimum"—not a maximum. That is to say, the plaintiff was to be on duty at least 40 hours a week, a longer time might be possible. A longer time was even probable and foreseeable. There is reason to suppose that the plaintiff did foresee this situation. Breakfast of course is prepared before the ordinary hours of labor and the concluding meal of the day is disposed of after the ordinary hours of labor. The plaintiff is presumed to have known that.

The plaintiff was also "to be employed on a full-time basis." "Full-time" and "part-time" have well-known meanings, and this meant that the National Youth Administration was to have available from the plaintiff a complete working-day.

About the fullness of plaintiff's working-day there can be no doubt. He was on duty more than half of the 24-hour day, and his working days included Saturdays and Sundays. This would be hardship for many.

With all this, there was no agreement by the Government, express or implied, to pay plaintiff more than it did pay plaintiff. There were no hours stipulated in the appointment other than that they were not to be less than 160 hours a month. The plaintiff had to be on duty at least 160 hours.

Even though the plaintiff were entitled to compensation in addition to his $100 a month or $125 a month, as the case might be, there is no way in which the amount of such addi-

tional compensation could be computed, for the arrangement under which the plaintiff was employed shows no maximum number of hours applicable to the stated salaries of $100 and $125 per month.

The plaintiff's petition states that he claims an overtime charge "in accordance with United States Labor Laws." Rule 11 of this Court requires a petitioner, in the event his claim is founded upon an act of Congress, to specify in his petition "the act and the section thereof on which plaintiff relies." This the plaintiff here has not done. While the Court desires to be liberal in a case of this character, it may not always supply and remedy major deficiencies in pleading.

The plaintiff is not entitled to recover and his petition is dismissed. It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

S. C. SACHS v. THE UNITED STATES

[No. 43565. Decided October 1, 1945]

On the Proofs

Government contract; defendant's delay in executing contract not sufficient excuse for plaintiff to postpone commencement of work.—Where on February 7, 1934, a contract was awarded to the plaintiff by the Government for the construction of an electrical underground distribution and street lighting system at Fort Sam Houston, and on February 12 plaintiff received triplicate copies of the written contract, which was dated February 8, 1934, which plaintiff promptly signed and returned; and where a signed copy was not received by the plaintiff until sometime between March 16 and March 28, 1934; and where the contract provided that work should commence on February 8, 1934; it is *held* that defendant's delay in executing the contract did not afford a sufficient excuse for plaintiff to postpone commencement of work under it, since plaintiff was fully aware of the terms of the contract and knew that its execution by the defendant was a matter of course, and plaintiff is not entitled to recover. *Thomas Earle & Sons, Inc. v. United States*, 90 C. Cls. 308, distinguished.

Same; plaintiff responsible for delay by failure to furnish required data concerning equipment.—Where it is shown that the plaintiff was largely responsible for the delay in commencing the work by failing to furnish for approval the list of equipment to be used, as required by the specifications; it is *held* that defendant's failure to avail itself of its right to reject plaintiff's bid for failure to furnish the necessary data did not constitute a waiver of this condition.

Same; allocation of overhead.—It is *held* that the plaintiff is entitled to recover the total sum of $2,979.49 for damages caused by delays incident to the issuance of four stop orders, including $1,536.98 for home office overhead for the 67 days of delay, allocating the overhead to the job in proportion to the cost of this job to the cost of all jobs in plaintiff's office during the year.

Same; findings of contracting officer not communicated to plaintiff are not conclusive.—The findings of the contracting officer, uncommunicated to the plaintiff, are not such findings as are made conclusive by the contract, and where the contracting officer fails to communicate his findings to plaintiff, plaintiff is entitled to sue in the Court of Claims without having taken an appeal to the head of the department.

Same; emergency work without written order; insufficient proof.—Where work was done by plaintiff in an emergency, plaintiff is not barred by failure to secure an order in writing for the extra work, but where proof of the cost of the extra work is insufficient, there can be no recovery.

The Reporter's statement of the case:

Mr. B. J. Gallagher for the plaintiff. *Mr. M. Walton Hendry* was on the brief.

Mr. F. J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. At all times prior to the events hereinafter mentioned and until after the commencement of this action, S. C. Sachs, Incorporated, was a corporation organized and existing under the laws of the State of Missouri, with its principal place of business at St. Louis, Missouri, all the capital stock, with the exception of two shares, being owned by S. C. Sachs. After this action was commenced, the corporation was dissolved. S. C. Sachs became the owner of all of the assets thereof and from that time has, as an individual doing business under the name of S. C. Sachs Company, continued to

carry on the business of the former corporation. For convenience S. C. Sachs, Incorporated, will be referred to as plaintiff.

2. On January 25, 1934, in response to an invitation by the United States, plaintiff submitted its bid to furnish the necessary material and equipment and to perform the necessary labor for the construction of an electric underground distribution and street lighting system at Fort Sam Houston, Texas, for the sum of $101,900. The time for performance proposed by plaintiff was inserted in the form provided by the United States and reads:

> Performance will begin within 10 calendar days after date of receipt of notice to proceed and will be completed within 120 calendar days from that date (the words "that date" refer to date of receipt of notice to proceed).

Plaintiff was notified by telegram dated February 7, 1934, that it had been awarded the contract. On February 10 plaintiff wrote defendant acknowledging receipt of this telegram and stating that they would execute the contract as soon as it was received and would have a representative on the field the latter part of the following week preparatory to getting the job under way. On February 12 plaintiff received from defendant triplicate copies of an unsigned contract, dated February 8, 1934, and on the same day signed and returned them to defendant. One copy of such contract, executed by defendant, was sent to plaintiff March 16, 1934, and was received and accepted by plaintiff sometime between that date and March 28. The provision in the contract with reference to time for performance reads:

> The work shall be commenced February 8, 1934, and shall be completed June 7, 1934.

3. At the time the contract was executed the portion of Fort Sam Houston, Texas, in which the work was to be performed, consisted of various office buildings, shops, barracks, residences, and other structures, some completed, some under construction, and others authorized to be constructed, but not yet under construction—all laid out in appropriate relation to streets, walks, and fields within a tract approximately

$1\frac{1}{3}$ miles in length by 1 mile in width at the greatest dimensions.

The electric distribution system for which bids were invited included the installation of a primary circuit of metal-covered cable in an underground system of fiber ducts encased in concrete which the specifications asserted were already installed by the defendant and ready for use. The contractor was to furnish the material and labor for pulling the cable through the ducts, to make all necessary splices, and to make all necessary connections with transformers, cutouts, switches, and other equipment in manholes and vaults. Transformers, cutouts, switches, and other equipment were to be furnished by the contractor. The specifications asserted that the manholes and vaults already had been installed.

The contractor was to install certain other primary circuits of metal-covered cable by the digging of trenches, laying the cable therein, making appropriate connections with transformers and other equipment in manholes and vaults, and backfilling.

By similar trenching processes, the contractor was to install secondary circuits from the transformers on the primary circuits to the services to the individual buildings.

Cable for street lighting already was installed by defendant, and the contractor was to install the street-lighting standards and luminaries, with specified controls and other equipment.

Other installations incident to the foregoing were to be made by the contractor.

In some instances certain portions of the work could not proceed until other portions were completed. A specific portion of a trench would have to be dug, for example, before cable could be installed in it and connections made. In the main, however, work of each of the various types was distributed over the entire area, and many types could proceed concurrently with other types. It was planned by the contractor that work of all types be largely concurrent.

4. On April 28 the time for completion was extended 30 days by Change Order "A" for the installation of primary and secondary service to an ordance building, a dispensary building, a prison, certain gun sheds, a garage, and 64 non-

commissioned officers' quarters. The change order increased the contract price by $1,383.55 and plaintiff makes no claim of damages for delay on account of the additional time required.

DELAY

5. Paragraph 21, page 27, of the Specifications, referring to service connections of the noncommissioned officers' quarters reads in part:

> * * * Ninety-four (94) of these quarters are now under contract and construction work is in progress.

This same specification further reads:

> The services to the company and field officers' quarters shall be extended through the existing underground conduit up to main line switch and connections made. These quarters are now under contract and construction work is in progress.

No representation was made as to when construction of these quarters would be completed.

At the time bids were invited, approximately 175 to 200 buildings were being constructed at the contract site. Plaintiff made no inquiry of defendant concerning the status of this construction work or as to the dates when it would be completed, but it did inquire of contractors doing the work whether or not, in their opinion, the work would progress rapidly enough for plaintiff to complete its work in the time that it anticipated. With the information plaintiff received from these contractors before it and on the basis of the facts stated in the specifications and drawings, plaintiff then computed its bid time for doing the work in 120 days.

Special Condition 10, page 8, of the Specifications, reads:

> The Contractor shall visit the site and become familiar with the existing layout before submitting bid.

No representative of plaintiff visited the site prior to bidding but plaintiff's vice-president and office superintendent Volm visited the site on or about February 10, and plaintiff's superintendent Jewett was there continuously from on or about February 21.

When plaintiff's vice president visited the contract site, he saw the commissioned officers' quarters and noncommissioned officers' quarters that were being constructed. Some of the buildings to which plaintiff was to install electric service had not been built and a portion of the underground duct system and manholes (the latter referred to in Finding 3) had not been completed.

6. On March 9, about three weeks after plaintiffs superintendent Jewett had gone to the site, the Constructing Quartermaster advised plaintiff by letter that the contract, signed by plaintiff, had been forwarded to the Quartermaster General for completion and upon its return a completed copy would be forwarded to plaintiff. Some preparatory work was done by plaintiff thereafter, but, because plaintiff was unwilling to commence until the contract signed by defendant was in its possession, no work on the installations required by the contract was commenced until on or about March 28.

7. On March 20, plaintiff, by Volm, its office superintendent, sent to defendant a progress schedule charting its plan for completing the work, but the exact time when the schedule was prepared does not appear. The letter which accompanied the progress schedule reads as follows:

> We are enclosing four copies showing progress schedule in connection with our contract which we are submitting for your approval. You will note in this progress schedule that we go considerably over our period time of completion. This is due to the fact that the work is not ready for us and we naturally could not complete same due to those conditions and have therefore spread out our schedule to conform to the conditions as they exist.
>
> Since it will require stop orders on certain portions of the work which is not ready for us so that the total time of these stop orders will conform to our schedule. In fact a lot of the stop orders will have to exceed even longer than our schedule. We will appreciate your forwarding us same so that our records may be complete on same.

The chart indicated that preliminary details and approvals of materials and drawings would consume the period from

about February 7 to March 31. Work on conduits and conduit fittings in houses and other structures was scheduled to commence March 15. Installation of primary cable in ducts was scheduled for the month of April and most of the work remaining was scheduled to commence late in April or on May 1. Installation of all primary cable, conduit work, house boxes, transformers, secondary distribution boxes in vaults, regulators, sectionalizing switches, regulator controls, cable racks and splices, was scheduled to be completed by June 1. Fireproofing, painting, and certain overhead and miscellaneous connections were to be completed by July 1. Installation of street-lighting standards and luminaires, and the trenching and backfilling for the secondary cable were to be completed by August 7, and the installation of secondary cable and leads was to be completed by August 31, thus finishing the entire job. The largest number of different types of work to be performed concurrently was in May and June.

8. Special Condition 6, page 7, of the Specifications reads in part:

> *Data with bids.*—Bidders shall furnish with their bid a complete list and complete data on all material and apparatus they propose to furnish; this shall include manufacturer's name, style and type, full electrical rating, physical characteristics, etc. Failure to provide such data may be considered cause for the rejection of any bid.

General Condition 17, page 5, of the Specifications reads in part:

> * * * The Contractor shall furnish the names of the manufacturers of mechanical appliances of every description, together with rated capacities and other necessary information to the C. Q. M. for his written approval before ordering or purchasing any of the above equipment.

On January 27, 1934, plaintiff submitted data covering certain transformers, lighting standards, submersible oil switches and a main substation oil switch. In its letter plaintiff said:

> We are sure this is all the data that is necessary, since all other items will be furnished in accord with specifica-

tions * * *. Would be pleased to furnish any further information that may be desired.

The defendant's Constructing Quartermaster on February 23, 1934, sent the following letter to plaintiff:

> It is requested that there be immediately submitted to this office for approval a complete list of materials which are to be used on the Electric Underground Distribution System at Fort Sam Houston, Texas, which contract has been awarded to you.
>
> This list is to be complete in all details and must include complete descriptive literature, manufacturer's name, rated capacities, styles, type, physical characteristics, blue prints, shop drawings, and all other necessary information pertaining to all equipment and material.
>
> It is also requested that samples of all cables be submitted at the earliest date possible.
>
> It is imperative that this request be complied with at once, so as not to delay the progress of the work.

March 1 plaintiff began submitting lists of material, samples, and detail drawings of equipment it intended using, and continued submitting such lists on March 2, 5, 6, 7, 8, 9, 15, 20, 22, 24, April 2, 11, 17, May 2, and May 14, 1934. The proof does not disclose that the defendant delayed approval of materials, samples, or detail drawings, but shows that plaintiff failed to submit them with its bid or promptly thereafter.

Plaintiff's failure in this respect was responsible in part for the delay in substantial commencement of the work.

9. *Stop Order of May 3.*—On May 3 defendant delivered to plaintiff a written order which reads:

> With reference to your Contract No. W 6278 qm–135 for the construction of Electric Underground Distribution and Street Lighting System at Fort Sam Houston, you will cease all operations on such part thereof which pertains to Vaults Nos. 21.C1 to 29C, inclusive, and the street-light poles and cable north of Austin Road.
>
> This Stop Order is occasioned by interference by the Government in its installation of duct system and vaults.

Vaults Nos. 21.C1 to 29C, inclusive, referred to in the foregoing order, were all the vaults on the primary circuit duct system in the circular group of officers' quarters north of Austin Road, as shown on plaintiff's exhibit 3, 15 struc-

tures either under construction or authorized, which were to be served by the secondary circuits leading from this primary circuit. The street-light poles and cable north of Austin Road, referred to in the order, are partly in the area of such officers' quarters and in part are adjacent to it. For convenience this area will be referred to as Area No. 1.

Paragraph 10, page 17, of the Specifications reads in part as follows:

> The manholes and vaults as shown on plans are now installed complete, but no racks or equipment of any kind is installed.

Paragraph 11, page 17, of the Specifications reads in part as follows:

> The duct system which is constructed of 3-inch fiber duct encased in concrete is entirely completed and ready for use as indicated on plans and hereinafter specified.

The order of May 3 was issued because the ducts and vaults had not been completed and plaintiff could not for that reason proceed with the installation of cables and equipment.

On June 3 defendant delivered to plaintiff a written order to resume work, which reads:

> With reference to our stop order dated May 3, 1934, to your contract W 6278 qm–135 for the construction of Electric Underground Distribution and Street Lighting System at Fort Sam Houston, Texas, you will proceed with this portion of your work without further delay.
>
> You will not be assessed liquidated damages for the 32 calendar days covered by this Stop Order.

10. *Stop Order of June 4.*—On June 4 defendant delivered to plaintiff a written stop order which reads:

> With reference to your Contract No. W 6278 qm–135 for the construction of Electric Underground Distribution and Street Lighting System at Fort Sam Houston, you will cease all operations on such part thereof which pertains to setting and installing street lighting standards on Division Avenue North of Sixth Street, and that portion east of Division Avenue.
>
> This Stop Order is made necessary because of interference by the Government in doing the necessary grading in the N. C. O. area.

The street lighting referred to in the above order serves a district on the east side of the tract shown in plaintiff's exhibit 3 covering an area approximately two-thirds of a mile long and one-tenth of a mile wide, bounded on the north by 8th Street, on the west by Division Avenue, on the south by Wilson Street, and on the east by an unlabeled street two blocks east of Division Avenue and containing 140 detached houses for noncommissioned officers, either constructed, under construction, or authorized. For convenience this area will be referred to as Area No. 2.

At the date of this order construction of buildings was still in progress, dirt was being excavated for foundations and was being piled where it interfered with and prevented plaintiff from performing the work described in the order.

On October 20 defendant delivered to plaintiff a written order to resume the work referred to in the order of June 4, which resumption order reads:

> With reference to our stop order dated June 4, 1934, to your contract W 6278 qm–135 for the construction of Electric Underground Distribution and Street Lighting System at Fort Sam Houston, Texas, you will proceed with this portion of your work without further delay.
>
> You will be exempt from liquidated damages on only ninety-two (92) calendar days of the entire time covered by this stop order since you were stopped on only a portion of the work under your contract. The 92 calendar days represent the actual delay in the completion of the entire job occasioned by this stop order.

11. *Stop Order of July 1.*—On July 1 defendant delivered to plaintiff a written order which reads:

> Reference your contract No. W–6278 qm–135, for the construction of Electric Underground Distribution and Street Lighting System at Fort Sam Houston, Texas, you will cease all operations on such part thereof which pertains to secondary service from vault No. 4–ACDF to Quartermaster Warehouse and secondary service from vault at Ordnance Shop to the Ordnance Shop.
>
> This Stop Order is occasioned by interference by the government in doing the necessary filling and grading around the Ordnance Building and Quartermaster Warehouse.

The Quartermaster Warehouse and Ordnance Shop are in the approximate locations shown on plaintiff's exhibit 3, between 2nd Street on the north and Wilson Avenue on the south, and a short distance east of the center of the tract. For convenience this area will be referred to as Area No. 3.

At the date of this order construction of the Quartermaster Warehouse and Ordnance Shop was still in progress and piles of dirt from the excavation, not yet removed or graded to final grade, prevented plaintiff from proceeding with the contract work.

On September 18 defendant delivered to plaintiff a written order to resume the work described in the Stop Order of July 1, which order of resumption reads:

> With reference to our stop order dated July 1, 1934, to your contract W 6278 qm–135 for the construction of Electric Underground Distribution and Street Lighting System at Fort Sam Houston, Texas, you will proceed with this portion of your work without further delay.
>
> You will be exempt from liquidated damages on only twenty-five (25) calendar days of the entire time covered by this stop order since you were stopped on only a portion of the work under your contract. The 25 calendar days represent the actual delay in the completion of the entire job occasioned by this stop order.

12. *Stop Order of July 26.*—On July 26 defendant delivered to plaintiff a written order which reads:

> Reference your contract No. W 6278 qm–135 for the construction of Electric Underground Distribution and Street Lighting System at Fort Sam Houston, Texas, you will cease all operation on such part thereof which pertains to secondary underground boxes and secondary underground cable in the 75 officers' and 94 noncommissioned officers' quarters area.
>
> The construction of the above buildings prohibit you from continuing with the work in that vicinity. You will be advised by this office when to proceed with this portion of your work.

The area referred to in said order as 94 noncommissioned officers' quarters is a major part of Area No. 2 described in Finding 10, in which work on street-light standards had been suspended by the order of June 4. At this time piles of dirt from excavations in this area, which occasioned the stop order of June 4, still were unremoved and ungraded.

The secondary underground boxes and cable referred to in the order of July 1 served the houses in a district approximately one-half a mile long by one-seventh of a mile wide, bounded on the north by 10th Street, on the west by the alley between Austin and Wheaton Roads, on the south by 4th Street, and on the east by Dickman Road. For convenience this area will be referred to as Area No. 4.

On August 15 defendant delivered to plaintiff a written order to resume the work described in the order of July 26, which order of resumption reads:

> With reference to our stop order dated July 26, 1934, to your contract W 6278 qm–135 for the construction of Electric Underground Distribution and Street Lighting System at Fort Sam Houston, Texas, you will proceed with this portion of your work without further delay.
>
> You will be exempt from liquidated damages on only twenty (20) calendar days of the entire time covered by this stop order since you were stopped on only a portion of the work under your contract. The twenty calendar days represent the actual delay in the completion of the entire job occasioned by this stop order.

13. On May 4 approximately 1/3 of 1% of the contract work had been completed. Failure to perform any substantial amount of work before that date was due (a) to failure on the part of defendant to execute and return the written contract to plaintiff until between the 16th and 28th of March; and (b) failure on the part of plaintiff to submit data, information, and drawings as set forth in Finding 8.

14. During May work progressed and by June 3 plaintiff had completed approximately 25% of the entire contract work. During May, because of the stop order of May 3, plaintiff did no work in Area No. 1.

At the end of June plaintiff had completed 46.9% of the entire contract work. During this month, because of the order of June 4, plaintiff could not perform any of the work pertaining to setting and installing the street-lighting standards in Area No. 2 and, because of the uncompleted construction of buildings, was prevented from performing certain secondary circuit work in Areas Nos. 2, 3, and 4.

At the end of July plaintiff had completed 66.03% of the entire contract work. During this month, because of the

order of June 4, plaintiff could not perform any operations pertaining to the setting and installing of street-lighting standards in Area No. 2. Because of the order of July 1, it could not perform any work pertaining to secondary service to the Quartermaster Warehouse and Ordnance Shop in Area No. 3, and, because of uncompleted construction of buildings, was prevented from doing certain secondary circuit work in Areas No. 2 and 4.

At the end of August plaintiff had completed 82.7% of the entire contract work. During this month, because of the order of June 4, it could not do any work pertaining to the setting of street-lighting standards in Area No. 2. Because of the order of July 1, it could do no work pertaining to secondary service to the Quartermaster Warehouse and Ordnance Shop in Area No. 3, and, because of the order of July 26, it was unable to perform work pertaining to secondary underground boxes and secondary underground cable in Areas Nos. 2 and 4 until August 15.

The percentage of work completed during the month of September does not appear, but at the end of October plaintiff had completed 98.98% of the entire contract work. During all of September and until the 20th of October plaintiff could not perform any work pertaining to the setting of street-lighting standards in Area No. 2, and during the first 18 days of September it could not do any work pertaining to the secondary service to the Quartermaster Warehouse and Ordnance Shop in Area No. 3.

15. The work was completed December 6, or 217 days after substantial commencement thereof. Because of the provisions in the orders to resume work stopped by earlier orders, no liquidated damages were assessed. At the time of making the contract plaintiff estimated that it could perform the entire contract work in 120 calendar days. This time was extended 30 days by the change order of April 28, making a total of 150 calendar days. There was an adequate supply of labor at the time the work was to be performed within practicable reach of the work. Plaintiff was adequately equipped to do the work and, except for the delays hereinbefore mentioned, plaintiff could have completed the entire contract work within 150 calendar days from date of sub-

stantial commencement on May 3, or on September 30. The extra time required, namely, from October 1 to December 6, inclusive, a total of 67 days, was due to the delays caused by the conditions which resulted in and by the issuance of the stop orders of May 3, June 4, July 1, and July 26.

The delays were not entirely cumulative, because a large portion of the contract work in other areas and some of the work in the same areas could and did proceed, notwithstanding the cessation of the particular work specified in the stop orders.

The delay in the performance of the entire contract as a result of the four stop orders was 67 calendar days, the difference between the time within which the work would have been done, in the absence of the delays above set forth, and the time actually consumed after substantial commencement.

16. *Liability Insurance.*—Plaintiff paid liability insurance at the rate of 2.082% of its pay roll. Except for the additional $630 salary of the superintendent at the site, the evidence does not show what, if any, extra labor cost was incurred by reason of the delay due to the stop orders.

17. *Rental Value of Equipment.*—Plaintiff had tools and equipment on the job worth $1,000. The reasonable rental value for such tools and equipment was $250 per year. The reasonable rental value during the 67-day period of delay due to the stop orders was $45.89.

18. *Equipment Rented From Others.*—Equipment rented by plaintiff from others was paid for only during the time when used, with the exception of an automobile rented for the use of plaintiff's superintendent, which was rented and paid for during the time of the delay caused by the stop orders, at the rate of $15 per month, or a total of $33.50 for the period of the delay.

19. *Loss in Efficiency of Employees.*—The evidence does not sustain plaintiff's claim that because of the delay due to the stop orders, plaintiff was unable during the latter part of the work to secure workmen as capable as those employed prior to the delays.

20. *Moving Equipment and Crews.*—Because of the work stoppages plaintiff at different times had to haul 60 poles

from the site of the work back to the storage yards. When interference by defendant ceased, plaintiff had to haul the poles back again to the locations where they were to be installed. The cost of the extra hauling was $12 per pole, or a total of $720.

When a stop order was issued as to a given area plaintiff was required to move the men working in such area to some other area at a loss of approximately 1½ hours in time. The evidence does not satisfactorily establish the number of employees so affected or the value of the time lost.

21. *Field Overhead.*—Plaintiff employed a superintendent at the site of the work continuously from the beginning of the work until its completion and paid him a salary of $70 a week to and including the week ending October 18. Thereafter and until the completion of the work plaintiff paid him a salary of $60 per week. The total amount of field superintendent's salary from September 30, the time the work would have been completed had there been no delay due to the stop orders, until and including the week ending December 6, was $630.

22. The total cost to plaintiff of all work done by it during the year 1934 was $312,519.20; the cost of the work involved on the contract for breach of which plaintiff sues in this case was $112,520.27. Plaintiff's total office overhead for the year was $23,258.58. Plaintiff's office overhead attributable to this particular contract was $8,373.09, based upon the ratio between the total cost of all work done during the year and the cost of this particular contract. The office overhead applicable to this particular job, therefore, was $22.94 per day, or a total of $1,536.98 for the 67 days of delay.

23. As a result of the stop orders plaintiff incurred the following costs, which otherwise would not have been incurred:

1. Liability Insurance (Finding 16)—2.082% of $630.00	$13.12
2. Rental value of plaintiff's equipment (Finding 17)	45.89
3. Rental of equipment (Finding 18)	33.50
4. Moving equipment (Finding 20)	720.00
5. Field overhead (Finding 21)	630.00
6. Office overhead (Finding 22)	1,536.98
Total	2,979.49

24. *Trenching.*—Paragraph 9, page 17, of the Specifications provides in part:

> Trenches shall be excavated to a minimum depth of 24″ for 600-volt Parkway Cable and minimum depth of 36″ for the 5,000-volt Parkway Cable from finished grade.

When plaintiff commenced to dig trenches for laying cable it was confronted with large piles of earth left by defendant as the result of excavating operations for houses and other structures. Plaintiff was obliged to dig trenches through this accumulated material at considerably more expense than it otherwise would have incurred. Some of the material had been excavated and could have been seen had plaintiff visited the site prior to making its bid. Plaintiff had to dig from 3 to 4 feet deep in at least 8,000 feet of such trenching, in addition to the depth of either 2 feet or 3 feet below finished grade. The cost thereof was 12 cents a lineal foot, or a total of $760.00.

25. *Kinks in cables.*—Paragraph 9, page 17, of the specifications reads in part:

> Trenches shall be of sufficient width to allow a minimum spacing of 4 inches between cables.

The defendant required plaintiff to adhere to this specification and to take out kinks in the cables. Plaintiff protested against this, claiming that this was an unreasonable requirement. The Construction Quartermaster told plaintiff to lay the cables in the manner required by the Government's inspector on the job.

Plaintiff made no further protest and laid the cable in the manner required. The inspector required no more of plaintiff than that required by the specifications.

26. *Marks in manholes.*—Paragraph 10, page 17, of the Specifications provides in part:

> During the course of construction and at the completion of the installation, the manholes and vaults shall be left clean in a satisfactory condition.

Defendant required plaintiff to remove marks from manhole walls left by a compound used in insulating. The cost to plaintiff was $32. The proof does not establish that defendant was unreasonable in its requirements in this respect.

27. *Tests.*—Special Condition 11, page 8, of the Specifications provides:

> The entire system shall be subject to a D. C. voltage test, and the whole system shall be placed in complete operation and shall be entirely free from grounds, short circuits, or other imperfections. All tests shall be made in the presence of the C. Q. M., or his authorized representative. D. C. voltage test shall consist of applying direct current to the material under test after it has been meggered, at a voltage specified by the cable manufacturers in the case of cables, and to a voltage as recommended by the standards of the A. I. E. E., on all other equipment. The cost of all tests shall be borne by the Contractor.

Plaintiff was required by defendant to test cables after they had been installed and it claims $285 as the cost thereof. The proof does not establish that defendant exceeded the specification requirements in this respect.

28. *Spare leads.*—In order to avoid splices in the main cable at some later date when additional equipment might be installed in the manholes, spare leads at the manholes were to be attached to the main cable at the time of installing the main cable. The proof does not establish that plaintiff was required to leave quantities of spare leads in excess of customary practice.

29. *Removing overhead connections.*—Paragraph 21, page 28, of the specifications reads in part:

> All aerial services shall be dismantled to the main overhead line and all such materials shall be delivered to location where directed.

As a result of removing the connections from building No. 26 to a pole, this pole fell and threw into the street and into an adjacent parking area a line carrying a high voltage. The pole fell because it was decayed, and because its support formed by the wire to building No. 26 was removed. It fell through no fault of plaintiff. Defendant required plaintiff

to clear up the wire. This necessitated the removal of connections to a distance of 3 poles away from the building. This was work not required by the specifications, but was done by the plaintiff without protest in the emergency. No claim was made for the cost thereof until plaintiff presented all its claims to the contracting officer on August 12, 1935. The proof does not show the cost of this extra work.

30. *Burned-out Transformer.*—A transformer, not yet accepted by the defendant, burned out and plaintiff was required to replace it with another transformer. The trouble was caused by either one or both of two conditions, neither of which is shown by the evidence to be the sole cause: (a) there was a defective unit in the core of the transformer; (b) a piece of copper wire was inserted by someone in a renewable fuse so that it no longer acted as a fuse. The evidence does not show who the person was who placed the wire in the fuse or whether he was an agent or employee of either party.

31. *Varnished cambric lead cable.*—Paragraph 18, page 24, of the specifications reads in part:

> *Conductors.*—Conductors shall be continuous from outlet to outlet and no splice shall be made except in outlet boxes. All wire shall be rubber covered, and shall be delivered on the job in new coils. * * *
>
> All rubber-covered wire shall have a voltage rating of 600 volts.
>
> * * * * *
>
> * * * Each conductor shall be insulated with the required thickness of performance type rubber in compliance with Federal Specification No. HH-1-531, which shall be evenly applied, homogeneous in character and which will adhere tightly to the conductor throughout its entire length.
>
> The above paragraph to be used where applicable and directed.

General Condition 10, page 3, of the Specifications reads:

> *Interpretation of Contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning

the C. Q. M. shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

In making the connections in the manholes between one of the transformers and a junction box plaintiff used rubber-covered cable, but before using such cable in making further connections between the transformers and the junction boxes, plaintiff called to the attention of defendant's inspector the fact that the oil in the transformer would deteriorate the rubber and that it was improper to use rubber-covered cable in making such connections. Defendant thereupon directed plaintiff to use varnished cambric cable instead of rubber-covered cable. Plaintiff replied that it was doing so under protest and would discuss the matter further with the Constructing Quartermaster at a later date.

According to common practice rubber-covered cable is not used for the purpose of making such connections.

32. Article 15 of the contract reads:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

On August 12, 1935, eight months after completion of the work and over five months after final payment, plaintiff submitted a written claim to the contracting officer for the items contained in findings 5 to 31, both inclusive, *supra.* On March 28, 1936, the contracting officer made findings of fact on all of plaintiff's claims, except those involving damages due to delays. All of plaintiff's claims set forth in findings 24 to 31, both inclusive, were denied. However, a

copy of these findings was not delivered to plaintiff, but was transmitted to the Comptroller General, who ruled against plaintiff on all items.

Not having received a copy of the findings of the contracting officer, plaintiff took no appeal to the head of the department.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff had a contract for the construction of an electrical underground distribution and street lighting system at Fort Sam Houston, Texas. It sues for damages for delays alleged to have been caused by the defendant and for certain other things required of it which it alleges were over and beyond the requirements of the contract and specifications.

1. The delays for which plaintiff sues are (1) a delay in the beginning of the work alleged to be due to the defendant's tardiness in executing the written contract; and (2) for delays caused by four stop orders.

The contract was awarded plaintiff on February 7, 1934. On February 12 plaintiff received triplicate copies of the written contract, which was dated February 8, 1934. It promptly signed all three copies, but it did not receive a signed copy from the defendant until sometime between March 16 and March 28, 1934. The contract provided that work should be commenced on February 8, 1934.

We are of opinion that defendant's delay in the execution of the contract afforded no sufficient excuse for plaintiff to postpone commencement of work under it. The contract was prepared by defendant and promptly mailed to plaintiff for signature. Plaintiff was, therefore, fully aware of the terms of its contract and it knew that its execution by the defendant was a matter of course. There was, therefore, no reason for it to delay commencing the work. The case of *Thomas Earle & Sons, Inc.* v. *United States*, 90 C. Cls. 308, relied upon by plaintiff, is not to the contrary. In that case plaintiff asked permission to proceed prior to receipt of notice to proceed and prior to approval of the contract. It was permitted to do so, but with the understanding that it

would be at its own risk. It sued for damages for a delay caused by a stop order issued between the date it had started the work and the date notice to proceed was received. Such are not the facts in the case at bar.

Moreover, the findings show that the plaintiff was largely responsible for the delay in commencing the work by failing to furnish for approval the equipment to be used in carrying out the contract. Special Condition 6 of the specifications reads:

> *Data with bids.*—Bidders shall furnish with their bid a complete list and complete data on all material and apparatus they propose to furnish; this shall include manufacturer's name, style and type, full electrical rating, physical characteristics, etc. Failure to provide such data may be considered cause for the rejection of any bid.

This specification was not complied with. The only data submitted by plaintiff prior to receipt of award of the contract was with reference to certain transformers, lighting standards, submersible oil switches, and a main substation oil switch. In submitting this data plaintiff said that it was sure that was all that was necessary since the other items would be furnished in accordance with the specifications. It was not all the data that was necessary by any means and defendant subsequently requested considerable additional data and this was furnished by plaintiff at various times between March 1 and May 14, 1934.

It is true that defendant did not avail itself of its right to reject plaintiff's bid for failure to furnish the necessary data, but it did not relieve plaintiff of the obligation to furnish it before the material was ordered and installed, as was required by General Condition 17 of the specifications. This required the contractor to furnish the names of the manufacturers of all mechanical appliances with their rated capacities "and other necessary information to the C. Q. M. for his written approval before ordering or purchasing any of the above equipment." This condition was never waived by defendant, and plaintiff's delay in complying therewith was chiefly responsible for the delay in starting the work.

Defendant issued four stop orders. The first was dated May 3, 1934 and continued in effect until June 3, 1934. It was issued because the ducts and vaults had not been completed by defendant, although paragraphs 10 and 11 of the specifications represented that they had been completed and were ready for use.

The next stop order was issued on June 4, 1934, and remained in effect until October 20, 1934. It applied to only a small portion of the work, that of setting and installing street lighting standards on Division Avenue north of Sixth Street, and that portion of the project east of Division Avenue. It was issued, as it shows on its face, "because of interference by the Government in doing the necessary grading in the N. C. O. area." The subsequent order lifting the stop order recited:

> You will be exempt from liquidated damages on only ninety-two (92) calendar days of the entire time covered by this stop order since you were stopped on only a portion of the work under your contract. The 92 calendar days represent the actual delay in the completion of the entire job occasioned by this stop order.

The next stop order was issued on July 1, 1934, and remained in effect until September 18, 1934. This also related to a very small portion of the work. As shown by the stop order, it was "occasioned by interference by the Government in doing the necessary filling and grading around the Ordnance Building and Quartermaster Warehouse." The order revoking it recited:

> You will be exempt from liquidated damages on only twenty-five (25) calendar days of the entire time covered by this stop order since you were stopped on only a portion of the work under your contract. The 25 calendar days represent the actual delay in the completion of the entire job occasioned by this stop order.

The next stop order was dated July 26, 1934, and remained in effect until August 15, 1934. It suspended work on the secondary underground boxes and secondary underground cable in the 75 officers' and 94 noncommissioned

officers' quarters area. This also related to a small part of the entire work. The order revoking it recited:

> You will be exempt from liquidated damages on only twenty (20) calendar days of the entire time covered by this stop order since you were stopped on only a portion of the work under your contract. The twenty calendar days represent the actual delay in the completion of the entire job occasioned by this stop order.

It will be noted that the Construction Quartermaster has found that the completion of the entire job was delayed 137 days by three of these stop orders; the stop order issued on May 3, 1934, caused a delay of 32 days, but there was no finding that the entire job had been delayed by it to any particular extent. The commissioner, however, has found that the delays were not cumulative, "because a large portion of the contract work in other areas and some of the work in the same areas could and did proceed, notwithstanding the cessation of the particular work specified in the stop orders." He has further found that the plaintiff could have completed the entire contract work within the 150 calendar days specified by it for the completion of the work, plus the additional time allowed for additional work called for by change order A; and he has found that the work actually required 217 days from the date of substantial commencement of the work. He, therefore, concludes that the total delay in the completion of the entire job was 67 days. We have adopted his finding as the most accurate computation of the delay actually caused, as disclosed by all the facts.

The parties are in substantial agreement as to the items of damage incident to the delay, with the principal exception of the amount to which the plaintiff is entitled for office overhead. The proof shows that the total cost of all work performed by plaintiff during the year in question was $312,519.20, and that the cost of this particular job was $112,520.27. Its total office overhead for the year was $23,258.58. Allocating this overhead to this job in proportion to the cost of this job to the cost of all jobs in the office during the year, results in the figure of $8,373.09 as that part of plaintiff's office overhead attributable to this particular job. This amount, divided by 365, gives an office over-

head of $22.94 per day, or a total of $1,536.98 for the 67 days of delay.

The other items of damage as set out in finding 23 are supported by the weight of the evidence.

It results that plaintiff is entitled to recover the total sum of $2,979.49 for damages caused by the delays incident to the issuance of the 4 stop orders.

2. As shown by the findings, defendant left large piles of dirt in places where plaintiff was required to dig trenches in which the cables were to be laid. The specifications required that the trenches be dug to a depth of 24 inches below finished grade for 600-volt cable, and 36 inches for 5,000-volt cable. On account of the piles of dirt left by defendant, plaintiff had to dig trenches from 3 to 4 feet deep in excess of the depth required by the specifications. This it did at a cost of $760.00. Plaintiff is entitled to recover this amount.

Defendant says plaintiff is not entitled to recover because it took no appeal from the findings of the contracting officer denying this claim. This, however, is not a good defense for at least one reason, to wit, because a copy of the findings was never delivered to the plaintiff, but, instead, was sent to the Comptroller General, who denied plaintiff's claim. As we have frequently held, the findings of the contracting officer, uncommunicated to plaintiff, are not such findings as are made conclusive by the contract. Where the contracting officer fails to communicate these findings to plaintiff, plaintiff is entitled to resort to this court for relief.

3. Plaintiff's next item of claim is for $6,022.66, the extra cost of laying the cables due to defendant's requirement that it take out all kinks in the cables.

Defendant's inspector did require plaintiff to lay the cable in a substantially straight line, but did not require that the cables be drawn taut. Plaintiff was permitted, and in fact directed, to leave waves in the cable to take care of contraction. The specifications required that the cable be laid not less than 4 inches apart. The inspector's requirements did not go beyond the requirements of the specifications.

Moreover, although plaintiff protested to the Construction Quartermaster against what the inspector was require-

ing, it did not pursue its protest further, and for this additional reason it is not entitled to recover.

4. As shown by the findings, defendant required no more of plaintiff with respect to cleaning the manholes than was justified by the specifications; nor were more tests required by the defendant than were called for by the specifications; nor did defendant require more of plaintiff by way of leaving spare leads than was required by the specifications.

5. Paragraph 21, page 28, of the specifications reads in part as follows:

> All aerial services shall be dismantled to the main overhead line and all such materials shall be delivered to location where directed.

As a result of removing the connections between building No. 26 and a pole, this pole fell and threw into the street and into an adjacent parking area a line carrying a high voltage. The pole fell because it was decayed and because its support formed by the wire to building No. 26 was removed. It fell through no fault of plaintiff. Defendant required plaintiff to clear up the wire. This necessitated the removal of connections to a distance of 3 poles away from the building. This was work not required by the specifications, but was done by the plaintiff without protest in the emergency. No claim was made for the cost thereof until plaintiff presented all of its claims to the contracting officer on August 12, 1935. Since the work was done in an emergency, plaintiff is not barred by failure to secure an order in writing for the extra work; however, the proof of cost of doing this extra work is insufficient, it is only an estimate, and for this reason plaintiff is not entitled to recover.

6. As shown by the findings, the evidence does not show that defendant was responsible for the burning out of the transformer which plaintiff was required to replace and, therefore, plaintiff is not entitled to recover on this item.

7. Plaintiff is not entitled to recover the excess cost of using varnished cambric lead cable to make connections in the manholes between transformers and junction boxes. The specifications provided for rubber covered cables only in cases where the use of such cables was applicable and

directed. The Constructing Quartermaster ruled that the use of rubber covered cables was not applicable in making connections between transformers and junction boxes, and directed that a different sort of cable be used. The findings show that in common practice rubber covered cable was not used to make such connections. The Constructing Quartermaster's ruling was justified by the specifications and was within the authority conferred upon him by General Condition 10 of the specifications designating him as the interpreter of the intent and meaning of the specifications.

On the whole case the plaintiff is entitled to recover from the defendant the sum of $3,739.49. Judgment for this amount will be rendered. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

HENRY ERICSSON COMPANY v. THE UNITED STATES

[No. 44614. Decided October 1, 1945]*

On the Proofs

Government contract; delay in furnishing drawings; damages; overhead; idle machinery; heat, etc.—Where it is found that as a consequence of the defendant's delay in furnishing full sized drawings, the plaintiff was delayed in completing its work; and where the proved damages resulting from this delay were the costs of job and main office overhead, the cost of having its machinery tied up on the job, the cost of additional form lumber which the plaintiff was obliged to buy because its plan of work was disrupted, and the cost of furnishing heat to the buildings for a period at the end of the contract after the time when the plaintiff would have had the job completed and turned over to the Government but for the delay; it is *held* that the plaintiff is entitled to recover.

Same; breach of contract.—Where it is found that the plaintiff was delayed in the completion of its contract by the Government's failure, without explanation, to make arrangements with the public utility company or electric service; and where it is

*Defendant's petition for writ of certiorari denied March 4, 1946.

found that the plaintiff was damaged by this delay; it is *held* that this delay was a breach of the contract, for which the plaintiff is entitled to compensation.

Same; decision of contracting officer; failure to appeal.—Where the plaintiff did not appeal to the head of the department, as it had a right to do under the contract, from a decision of the contracting officer with regard to the installation of certain laundry tables; it is *held* that the decision of the contracting officer was final, under the provisions of the contract, and plaintiff is not entitled to recover.

Same; decision of contracting officer and head of department in accord with evidence.—Where the plaintiff submitted its bid without seeking a clarification of the provision of the contract relating to the preparation of certain tree pits, which were shown on the drawings as outside the property line of the project; and where the decision of the contracting officer against plaintiff's contention, affirmed on appeal by the head of the department, is found to be sustained by the evidence; it is *held* that the plaintiff is not entitled to recover.

Same; rental value of idle machinery.—In computing the plaintiff's damages resulting from the delays caused by the Government's breaches of contract, there is included compensation for machinery owned by the plaintiff and rendered idle by the delay, and because of the absence of wear and tear upon it, the award is upon the basis of one-half of the fair rental value of the machinery. *Brand Investment Company* v. *United States*, 102 C. Cls. 40, certiorari denied, 324 U. S. 850, cited.

Same; office overhead included in compensation for delay.—A proportionate part (in the instant case, substantially all) of the plaintiff's main office overhead for the period of delay is included in the award of plaintiff's compensation for delay by the Government. *Brand Investment Company* v. *United States, supra.*

Same; increases in salaries in effect distribution of profits.—Increases in salaries made after the instant contract was substantially completed, going to officers of the company who were substantial owners thereof and representing in effect a distribution of profits, are not included in office overhead for the purpose of computation of the amount due as compensation for delay.

Same; acceptance of change orders not relating to breaches of contract.—Where the contract in suit was completed within the contract time, as extended by change orders; and where such change orders each extended the time of performance by a specified number of days; and where some of these change orders involved new or different work, not contemplated by the original contract; and where there was no relation between

these change orders and the delays involved in the instant suit, which the court has found to constitute breaches of the contract; it is *held* that the acceptance of the change orders does not foreclose the plaintiff from a remedy for breaches of contract which in fact delayed and damaged it. *Leo Sanders* v. *United States, ante*, p. 1, distinguished.

Same; decision of department head not final where deciding officer is not aware of problem involved.—Where plaintiff asked for a change order, in accordance with the terms of the contract, compensating it for the cost of the heat furnished by plaintiff during the period performance was delayed by the Government, as found by the court; and where the decision of the contracting officer, denying the request was, on appeal, affirmed by the head of department, who in his decision showed that he was not aware of the nature of the problem involved in the claim; it is *held* that in the circumstances the plaintiff did not have the fair hearing and decision to which the contract entitled him, and the decision of the head of the department is accordingly not final.

Same.—Where it is obvious that the deciding officer is not aware of the problem which he is called upon to decide under a Government contract, it is not necessary to apply such words as "arbitrary", "capricious" or "bad faith", in assigning the reason why his decision lacks finality.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *Messrs. King & King*, and *Mr. Harry D. Ruddiman* were on the briefs.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Illinois, with its principal office and place of business at Chicago, Illinois, and engaged in the business of building construction.

2. Pursuant to advertisement and bid, plaintiff and the defendant entered into a contract September 3, 1936, by which, in consideration of $2,097,600 to be paid by the defendant, plaintiff promised to furnish all labor and materials and to perform all work required for the construction of the superstructures in the north sector of the Julia C. Lathrop Homes in Chicago, Illinois (Federal Emergency Adminis-

tration of Public Works, Housing Division, Project No. H–1406), in accordance with plans and specifications submitted to bidders and made a part of the contract, which contract, plans, and specifications are made a part hereof by reference. The south sector, of comparable size, was to be built at the same time by other contractors. For convenient reference plaintiff's contract work will be called the Lathrop job.

The contract provided that work should be commenced upon receipt by the contractor of notice to proceed and should be completed within 365 calendar days from the date of receipt by the contractor of that notice. Notice to proceed was received by plaintiff September 23, 1936. During the progress of the work change orders altered the contract requirements and extended the time for completion 74 days. The job was completed within the extended time required and plaintiff has been paid the full price specified in the contract, as adjusted by the change orders.

3. The contract provided for the construction of 17 buildings, which were to contain in the aggregate 484 apartments, with a total of 1,690 rooms. Eleven buildings were to be 3-story; five were to be 2-story, and the administration building was to be 1-story. The exterior wall foundations had already been installed, but plaintiff was to install interior column foundations. The reinforced concrete floor slabs and roof slabs were to rest directly on the walls, which were to be built of one course of brick, backed up by tile. The contract work also included plumbing, electrical wiring, electrical equipment, and heating equipment, including radiators and pipes, but not the construction or equipment of a heating plant. A central plant for supplying steam for heat for both sectors was to be erected on the south sector by contractors other than plaintiff. The contract work also included certain specified grading and planting, laying of sidewalks and pavement.

4. Plaintiff's plan of operation contemplated (1) the necessary sequence of classes of work in the construction of the individual buildings and (2) the usual, customary and proper coordination of work on the buildings as a whole so that construction of a number of buildings would go forward

concurrently, separate types of work being rotated among the buildings in such manner as to provide for continuous progress in each class of work and, at the same time, to assure the performance of each class of work in a single building in proper sequence with other work on that building.

5. The plan of operation for the individual buildings was dictated largely by the nature of the structures. Except for interior supports, each floor slab supported the wall above it and each wall supported the concrete slab for the next floor, the walls of the highest floor supporting the roof slab, so that the sequence of construction for each building necessarily was in substance: (1) interior column supports would be installed and the concrete slab for the first floor poured; (2) after approximately one or two days for the hardening of the first floor slab, the brick and tile walls would be erected by a different crew of workmen; (3) columns for the interior support of the second floor slab and the second floor slab would be poured; (4) the second floor walls would be built; (5) columns for interior support of the third floor slab and the third floor slab would be poured; (6) the third floor walls would be built; (7) columns for the support of the roof slab and the roof slab poured; (8) parapets and penthouse would be erected; (9) insulation, paper, and tar covering would be put on the roof. The procedure was the same for two-story buildings, except that they did not include penthouses. As the work progressed on each floor, the necessary sleeves, conduits, pipes, and the like, would be placed to accommodate the plumbing and heating and electrical wiring. After the building was closed in, plastering, interior carpentry, painting, and other interior work, would be performed.

6. For the coordination of the entire work it was planned to pour the floor slab of the first building and immediately thereafter to pour consecutively the first floor slabs of six more buildings. By the time the first floor slab of the seventh building had been poured, the brick and tile first floor walls of the first building would have been completed, and forms would have been erected for the interior supports at that level and the first building would be ready for the pouring of the second floor slab. By the time the second floor slab of the first building had been poured, the second building

would be ready for the pouring of its second floor slab. This process would continue through the seven buildings and would be repeated for the third floors and the roofs. Thus, work on a number of buildings would progress simultaneously, while each class of work on each building would be done promptly and in proper sequence as respects the individual building. This plan of operation and the sequence of the work would permit an economical use of workmen, equipment, materials, and forms, and would result in minimum costs. A similar sequence was to have been followed in the remaining buildings.

7. In late September or early October of 1936, plaintiff delivered to the defendant a progress schedule, containing the sequence outlined above, and showing the proposed dates of commencement and completion of each of the various subdivisions of work required under the contract documents. At the request of the defendant and in order that the form should correspond with a similar progress schedule relating to the south sector of the project, plaintiff submitted a second progress schedule showing the same plan of operation, but in a somewhat different form. October 21, 1936, plaintiff submitted to the defendant a written statement of the sequence, by designated buildings, in which it expected to pour the first floor slabs. A written statement of modifications in the latter portion of this sequence was submitted by plaintiff to the defendant November 7, 1936.

DELAY—Drawings, Stonework

8. Certain drawings, referred to in the contract and specifications and made a part thereof, were sufficiently detailed that it was unnecessary for the defendant to furnish further drawings to enable plaintiff to execute the work involved in them. But there were, as in normal practice there usually are, detailed matters not shown in the contract drawings concerning which the defendant had to furnish what are called "full size" drawings before plaintiff could proceed with the work. Article 2 of the contract reads, in part:

> The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

The specifications read, in part:

> The general character of the detail work is shown on the drawings, but minor modifications may be made in the full size drawings or models. The Contractor and the Contracting Officer shall from time to time prepare schedules showing the dates on which the various detail drawings will be required, and the Contractor shall not attempt to execute any part of the work requiring such drawings until he has received the same (General Conditions, Sec. 5, p. 8).

9. Where certain finished items of special design were required to be manufactured prior to installation, "shop drawings" for such items were to be prepared by plaintiff from details shown by full size drawings furnished by the defendant. With reference to such shop drawings, the specifications read in part:

> Shop drawings required by the Specifications generally will be checked and approved by the Architect and the Contracting Officer at Washington, D. C. The Contracting Officer may, in specific instances, direct that shop drawings be approved by the Architect and the Project Manager (par. 1, p. 65).

10. The specifications, Division IX, p. 107, relating to stone work, read in part:

> SEC. 1. SCOPE OF WORK.
>
> 1. The work includes all labor, materials, equipment and services required to furnish and set all stone to fully complete the project in accordance with the drawings and as specified.
>
> * * * * *
>
> SEC. 3. SHOP DRAWINGS.
>
> 1. Shop drawings shall show all pieces, together with all anchorage, including completed setting details, subject to the provisions "Shop Drawings."
>
> SEC. 4. CUTTING AND FINISHING.
>
> 1. All cutting shall be done in strict accordance with the approved shop drawings.

11. On or about November 6, the first floor slab of the first building in the planned sequence had been poured and plaintiff was ready to proceed with the erection of the first story brick exterior wall and thereafter, at intervals averaging 3¼

days, became ready to erect the exterior walls of the remaining buildings. The stone trim for the front entrances had to be set into the walls as the brick was laid and the first story walls could not be completed until the stone trim had been cut to required shapes and dimensions at a stone mill and shipped to the site of the job. Plaintiff was required to furnish shop drawings, approved by the defendant, for the manufacture of the stones and it was necessary for plaintiff to have full size detail drawings in order to prepare shop drawings. In the usual course of manufacture and delivery, it required three weeks after shop drawings were approved by the defendant to get the finished stone delivered to the site of the job.

12. Ordinarily, full size detail drawings are furnished to the contractor at the time he is notified to proceed. Often they are supplied when the contract is signed, or shortly thereafter, and invariably they should be available to the contractor in ample time for the preparation, submission, and approval of shop drawings, and the manufacture and delivery of the material covered by them before it is needed in the course of construction. The defendant knew that the stone was needed for the first floor walls and that those walls would be among the earliest items of construction. The progress schedule furnished to the defendant by plaintiff about October first showed that plaintiff planned to commence the first floor walls of the first building on November 4. In the ordinary and usual course, it would be necessary for the full size detail drawing for the particular stone to be received by the contractor approximately five weeks before the stone was needed for setting into the wall.

The first full size detail drawings for entrance stone trim were received by plaintiff from the defendant on October 30, a week before stone was needed for the first building and 57 days after the date of the contract. No drawings for the first, second, fifth, seventh, eighth, ninth, eleventh, or fourteenth buildings in the planned construction sequence were included in that lot. The drawings for the third and thirteenth buildings were incomplete and complete drawings were included for only the fourth, sixth, and twelfth buildings. Additional drawings were received by plaintiff Novem-

ber 11, November 30, December 11, and December 12. Drawings for the first and second buildings in the planned construction sequence were not received until November 11; those for the third building were not received until November 30 and those for the fifth building until December 12.

Plaintiff requested prompt delivery of the drawings for stone trim on October 12, October 26, and again on November 5. On November 7, 13, 19, 21, and 30, and on December 5, 11, and 21, plaintiff protested in writing to the defendant against the continuing delay, and in several of the letters advised the defendant that extensions of time would be demanded and damages for delay would be claimed. No action was taken by the defendant upon the plaintiff's claims for damages.

13. Meantime, in the absence of full size detail drawings, plaintiff undertook to prepare shop drawings for the stone from information disclosed by the plans, and submitted such drawings to the defendant's architects for tentative approval, upon an understanding with the defendant's representatives at the site that the architects would recommend the usual corrections, which plaintiff would make before submitting final copies to the architects and to the Housing Division at Washington for approval, as the specifications required. The first shop drawings were submitted to the architects October 12 and the last November 14, 1936. In response to complaint by plaintiff over delay in getting tentative approval from the architects, the Director of Housing on November 18 wrote to plaintiff that no material was permitted to be fabricated without approval of shop drawings by the Housing Division at Washington, called attention to the fact that specified procedure required submission of drawings to the Housing Division at Washington, as well as to the architects, and advised compliance. Thereupon, plaintiff sent copies of all shop drawings to the Housing Division at Washington. After this was done, an average of nearly 25 days elapsed before approved drawings were returned to plaintiff, and none of the shop drawings were finally approved until after full size detail drawings for the stone involved had been given by the defendant to plaintiff. Not more than two weeks would have been a reasonable time for

the defendant to check and finally approve these shop drawings.

Most of the delay was caused by the failure of the architects to make tentative approvals or to submit to Washington the shop drawings approved by them, but a substantial delay occurred in the approval by the Housing Division at Washington. Had the full size drawings been furnished to plaintiff in time to submit and obtain approval of shop drawings in the ordinary course, the finished stone would have been delivered to the site of the work by the time the first floor slabs were poured and plaintiff was ready to proceed with the first-story walls. Instead, the delay in receiving the stone delayed laying the brick first-story walls. This, in turn, delayed the next operation in the sequence, and the delay continued accordingly into each of the classes in the planned sequence of the work.

14. Because of the disruption of plaintiff's planned operations and delay in the early units of the planned sequence, completion of the entire job was delayed. At least 47 days of delay in completion of the entire job is attributable to the delay of the defendant in furnishing full size detail drawings for stone work and its failure to cooperate in plaintiff's efforts to secure approval of shop drawings in the absence of full size drawings.

DELAY—Brick Work

15. The face brick prescribed by the specifications for the exterior walls was to approximate the characteristics in respect to color and texture of samples held for inspection at the office of the architect during the period of bidding and was of a kind known as Autumn Tint Brick. On November 17, in compliance with the specifications, plaintiff built a sample panel of brick wall. The brick conformed with the samples exhibited during the period of bidding. The brick were in two colors, some red and some buff. The defendant's architects examined the wall the day it was built and took exception to the mixture of colors in the sample wall. No delay in the construction of walls was occasioned by these objections.

16. There was some delay in the brick work due to a change order. On October 21, 1936, the defendant's architects

wrote to plaintiff directing it to use shale brick for certain of the buildings. Shale brick was different from and more expensive than the specified Autumn Tint Brick and plaintiff advised the defendant that the use of shale brick would call for extra payment. The defendant determined to use shale brick to the extent of 30% of the entire amount of brick used, and on certain buildings. Plaintiff received a proceed order from the contracting officer on December 4, and on that day submitted a proposal for an adjustment of price due to the extra cost of shale brick. On June 18, 1937, a change order allowing the amount claimed in that proposal was issued by the contracting officer. The delay by the defendant in determining to proceed was not due to any act or fault of plaintiff. The delay was concurrent with the delay relating to full size drawings and shop drawings for stone and the final completion of the work was not delayed by the brick incidents.

DELAY—Steam for Testing Heating System

17. The specifications called for a heating system supplied by steam from a power plant located on the south sector of the project. Steam at relatively high pressure was to be distributed to the buildings by an underground main distribution system. The steam pressure was to be reduced by appropriate valves and the steam distributed through the buildings by a two-pipe low-pressure vacuum return system. Vacuum pumps operated by electric motors were essential to the operation of the low-pressure system in the buildings. Installation of the low-pressure system in the buildings, including the vacuum pumps, was a part of plaintiff's work under its contract. Construction of the power plant and main distribution system was not included in plaintiff's contract and the defendant was to furnish steam for testing purposes.

18. The specifications provided that, when the entire system had been completed, the system was to be blown out by steam to clean it, after which an eight-hour working pressure steam test on the entire heating system was to be conducted, followed by the adjustment of all apparatus so as to put it in proper working condition. Thereafter, a forty-eight-hour

operating test was required. In order to conduct these tests it was necessary that electric power be available to operate the stoker at the power plant and the motors in the vacuum pumps.

19. Except as hereinafter stated with reference to electrical equipment, plaintiff was ready for the steam tests on or about September 13, 1937, and on that day requested the defendant to provide steam for that purpose, but the defendant did not provide steam until October 13. For reasons not disclosed by the proof plaintiff did not commence the blowing out operations for five days after steam had been made available.

20. The reason steam was not supplied by the defendant prior to October 13, was that the utility company, which was the source of the electrical energy with which to operate the stoker at the power plant, did not supply the electrical energy until October 12. The utility company did not supply the electrical energy prior to October 12 because the defendant had not signed the contract therefor.

21. Earlier in the course of construction, plaintiff had furnished to the defendant samples of one of the types of vacuum pumps indicated in the specifications and they were approved by the defendant, after which approval they were installed by plaintiff. Later it was discovered that the wiring specified by the defendant was not heavy enough to conduct the load of electricity required to operate the pumps. Plaintiff called the attention of the defendant to this situation on July 30, 1937, and asked the defendant to direct what should be done. Having received no directions from the defendant, plaintiff made specific suggestions on September 13 for the installation of heavier wire. Plaintiff could not install the new wire until authorized by the defendant, and the defendant issued a proceed order September 18, authorizing plaintiff to proceed with the installation of the larger wire. Ultimate completion of the project was delayed by these circumstances about 10 days, but the delay was concurrent with the delay due to lack of steam for testing.

22. During the period between September 13 and October 13 plaintiff's subcontractor was engaged in work on transformer vaults in the north sector and it is possible, but not

satisfactorily proved, that, even if the defendant had signed a contract for electrical energy, the utility company would have declined to supply power while some of this work was being prosecuted. The trouble which was being remedied by that work was due to two faults in design: first, one of the vaults was not water-proofed and, in addition, received drainage through conduits from manholes, causing fuses to blow under test, and, second, the wiring circuits shown on the drawings produced an unbalanced electrical load, when a balanced load was essential. The latter defect in design was corrected under a plan worked out by the contractor. This work in the vaults was not due to delay or improper workmanship on the part of the plaintiff or its subcontractor.

23. The specifications provided that, after all specified tests had been made and approved, all low pressure steam mains and branches were to be covered with insulating material and three coats of paint applied. The delay in making tests delayed this work. The delay resulting from failure to receive steam when ready to test the heating system and due to the necessity of replacing wiring for the vacuum pumps resulted in a delay of 17 days in the ultimate completion of the entire job, in addition to the delay relating to drawings mentioned in findings 8–14.

DELAY—Sidewalks

24. Plaintiff was required by the plans and specifications to install certain sidewalks on Oakdale Avenue. October 11, 1937, after grading had been completed and curbs and forms installed, the City of Chicago stopped the work because of conflict with city ordinances. Plaintiff notified the defendant of this situation by letter dated October 14. After some correspondence between plaintiff and the defendant, on November 8, plaintiff was advised to proceed in accordance with the requirements of the city authorities. As the delay was concurrent with the ultimate delay in completion of the entire job caused by failure of plaintiff to receive drawings and in relation to the heating system, as set forth in findings 8–23, the delay in connection with the sidewalks did not result in any delay in the ultimate completion of the entire job.

DELAY—Cost of Forms

25. Plaintiff's plan of operation, more fully described in findings 4–6, was to pour the first floor slabs of seven buildings, then to follow with the second floor slabs and the remaining stories of such buildings. Plaintiff planned to proceed thereafter with the first floor slabs of the remaining buildings and to complete them in the same manner.

Because of delays relating to drawings for the stone work, plaintiff could not proceed as planned and, instead of pouring only the first floor slabs of the first seven buildings and then starting with second floor slabs, plaintiff was required, in order to prevent further loss, to pour the first floor slabs of all the buildings before pouring the upper story slabs of the first seven buildings. In the planned sequence of construction plaintiff would have re-used form work from the first seven buildings, but under the revised sequence was obliged to purchase additional material and to build additional forms. Plaintiff's cost for the additional material was $4,853.24. No additional cost for labor in this regard is satisfactorily proved.

DELAY—Field Costs

26. Plaintiff incurred the following increased field costs each calendar day, for 47 calendar days, on account of delay by defendant with relation to full size and shop drawings, as set forth in findings 8–14:

	Labor	*Material and other expenses*
1. Concrete inspector	$9.17	
2. Superintendent	22.00	
3. Assistant Superintendent	12.14	
4. Carpenter foreman	16.00	
5. Cement finisher foreman	10.00	
6. Assistant mason foremen (2)	27.20	
7. Assistant carpenter foremen (2)	18.57	
8. Labor foreman	7.86	
9. Lay-out man	6.79	
10. Paymaster	6.79	
11. Toolman	5.86	
12. Assistant lay-out man	5.71	
13. Assistant labor foremen (4)	23.43	
14. Timekeeper	5.71	
15. Material clerk	5.71	

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	Labor	Material and other expenses
16. Office clerk	$4.11	
17. Water boys (3)	5.57	
18. Watchmen (6)	21.60	
19. Janitor, Field Office	3.60	
20. Field office maintenance	1.97	
21. Field office heat	1.97	$1.00
22. Lights for construction	8.57	2.00
23. Fire insurance		5.08
24. Field office telephone		1.00
25. Field office light		.25
Total per calendar day	230.33	9.33
Total labor		230.33
Total materials and other expenses		9.33
Insurance on labor at 0.05691		13.11
Social Security on labor at 0.03		6.91
Total increased cost per calendar day		259.68
Increased field cost for 47 calendar days		12,204.96

27. (a) Plaintiff owned certain items of equipment which it used on the work here involved and which, because of the delays in connection with the full size and shop drawings, it was obliged to keep on the job 47 calendar days longer than would have been required had such delays not occurred. The items of equipment and their reasonable rental value per calendar day are as follows:

1. 1-yard concrete mixer	$10.71
2. ¾-yard concrete mixer	7.14
3. Bins	7.14
4. Crane and bucket	17.86
5. Trucks (5)	25.00
6. Saw plant	1.43
7. Surveyor's level	.36
8. Surveyor's transit	.36
Total rental value per calendar day	70.00
Rental value for 47 calendar days	3,290.00
Less fifty percent reduction for non-use	1,645.00
Compensation to which plaintiff is entitled	1,645.00

There is no evidence of any other planned use of this equipment by plaintiff during that period.

(b) Plaintiff rented four hoist engines from the Thomas Hoist Company and paid therefor $12 per day for a five-day week, or $8.56 per calendar day, and, because of the delay described above, plaintiff was obliged to keep them on the job 47 calendar days longer than would have been required had the delay not occurred. The cost for 47 calendar days was $402.32.

28. Plaintiff incurred the following increased field costs each calendar day, for 17 calendar days, on account of the delay caused by the defendant with relation to steam for testing the heating system, as set forth in findings 17–23.

	Labor	*Material and other expenses*
1. Superintendent	$22.00	
2. Assistant Superintendent	12.14	
3. Carpenter foreman	16.00	
4. Labor foreman	7.86	
5. Paymaster	6.79	
6. Timekeeper	5.71	
7. Material clerk	5.71	
8. Office clerk	4.11	
9. Water boys (3)	5.57	
10. Watchmen (6)	21.60	
11. Janitor	3.60	
12. Field office maintenance	1.97	
13. Field office heat	1.97	$1.00
14. Lights for construction	8.57	2.00
15. Fire insurance		5.08
16. Field office telephones		1.00
17. Field office light		.25
Total per calendar day	123.60	9.33
Total labor		123.60
Total materials and other expenses		9.33
Insurance on labor at 0.05691		7.03
Social Security on labor at 0.03		3.71
Total increased cost per calendar day		143.67
Increased field cost for 17 calendar days		2,442.39

DELAY—General Office Overhead

29. With unimportant exceptions, the Lathrop job was the only job being done by plaintiff from September 1936, to

December 1937, inclusive, and the general office overhead, if allocable in proportion to the cost of the various jobs done, would be allocable almost entirely to the Lathrop job. The exact amounts appear later herein.

From September 1936, to October 1937, inclusive, plaintiff's general office overhead varied from $5,001.45 to $6,400.49 per month, the average being $5,489.80. This included rent, employees' salaries, stationery, taxes, advertising, and similar items. It included also the salaries of Henry Ericsson and his three sons, Clarence E. Ericsson, Walter H. Ericsson, and Dewey A. Ericsson, the four of whom were the officers and the owners of the stock of the plaintiff corporation. Their aggregate monthly salaries from September 1936, to January 1937, inclusive, were $2,128 and from February 1937, to October 1937, inclusive, were $2,314.66.

After the first of November 1937, when the job was approximately 98% completed, the board of directors, composed of the four Ericssons, increased their salaries as officers to the aggregate sum of $6,000 per month, the increases to commence retroactively as of January 1, 1937, except in the case of Dewey A. Ericsson, whose increase was to commence as of February 1, 1937.

The individual monthly salaries before and after the increases were:

	Prior to November 1937	*Amount to which increased*
Henry Ericsson	$634.66	$1,500.00
Clarence E. Ericsson	560.00	1,500.00
Walter H. Ericsson	560.00	1,500.00
Dewey A. Ericsson:		
September 1936–January 1937	373.00	
February 1937–October 1937	560 00	1,500.00

November 4, 1937, the four Ericssons were paid an aggregate of $37,040.06 for back salaries authorized by the increase, and the amount was charged to "Officers Salary Account" and included in the general office overhead.

The deductibility of salaries as an expense in the computation of corporate income tax had some influence on the increase in salaries, but the increases were made in pursuance of a policy of long standing. When the corporation had a large volume of business and the Ericssons were doing more

work, salaries were more liberal and when it was necessary to retrench in bad years, the salaries were reduced. The average of aggregate monthly salaries for fourteen years prior to the increase here involved was approximately $3,360. The increases were not proportionate to the stock ownership, but such increases were given only to the Ericssons, who owned the stock. The relative stock ownership among the Ericssons is not shown by the record.

The record does not show the nature and extent of services rendered to the corporation by the Ericssons. Dewey A. Ericsson was closely connected with the Lathrop job in a supervisory capacity, but the record does not disclose what connection the other Ericssons had with the business of the corporation except that they were the the owners of the stock, were the officers, and, together with Dewey, "operated the company." What services they rendered, what their duties were, what their qualifications and abilities were, what a reasonable compensation for their services would be, do not appear from the record.

There was no causal connection between the increase in officers' salaries and the delays set forth in findings 8–23. Continuing items of general office overhead such as insurance, office rent, office employees' salaries, taxes, and depreciation were not increased because of such delays. Plaintiff did not forego any other business on account of such delays. Except for the salary of an office clerk, included in the items of the field costs in findings 26, it is not proved that general office overhead was actually increased by reason of the delays set forth in findings 8–23.

30. The field cost from September 1936 to December 1937, inclusive, of all jobs done by plaintiff, the field cost of the Lathrop job, the percentage of the whole allocable to the Lathrop job, the entire general office overhead, and the portion allocable to the Lathrop job in the same proportion that its field costs bore to the whole are as follows:

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NOT INCLUDING PAY INCREASES

Cost of all jobs	Cost of Lathrop job	Percentage allocable to Lathrop job	All general office overhead	Amount allocable to Lathrop job
		Percent		
$1,734,730.12	$1,720,650.47	99.188	$87,712.86	$87,000.63
INCLUDING PAY INCREASES				
$1,734,730.12	$1,720,650.47	99.188	$132,123.60	$131,050.76

Upon the basis of the foregoing table, general office overhead allocable to the 64 days' delay relating to drawings and to the heating system, as set forth in findings 8–23, would be:

IF THE PAY INCREASE OF NOVEMBER 1 IS NOT INCLUDED

Overhead allocable to Lathrop job	Total days	Amount per day	Amount allocable to 64 days' delay
$87,000.63	487	$178.65	$11,433.60
IF THE PAY INCREASE OF NOVEMBER 1 IS INCLUDED			
$131,050.76	487	$269.10	$17,222.40

DELAY—Interest on Deferred Payments

31. Article 16 of the contract provided that in making monthly partial payments on estimates of work performed and materials delivered to the site of the job, 10 percent of the estimated amounts would be retained by the defendant until final completion and acceptance of all the work covered by the contract, with authority in the Contracting Officer to relax the reservation in some respects. As a result of the delays relating to drawings and to the lack of steam for testing the heating system, plaintiff was not paid the deferred percentages until 64 days later than it would have been paid otherwise. The exact amount of the deferred payments is not shown, but it was not less than $104,207.50, and plaintiff claims to be entitled to interest at the rate of 6 percent per annum on the amount thereof for the number of days it was deprived of the deferred payments by reason of the delays.

DELAY—Wage Rate Increases

32. There were union wage rate increases on the work here involved applicable to certain mechanics June 1, 1937, and to certain other mechanics July 1, 1937. Some of the work performed by these mechanics after June 1 and July 1, respectively, would have been completed prior to those dates had the job not been delayed in connection with shop drawings and full-size drawings and plaintiff was obliged to expend for such labor more than it would have otherwise been obliged to spend. The evidence does not show the extent of that labor or the amount of the excess expenditures.

TEMPORARY HEAT

33. Section 17 of the General Conditions of the specifications, providing for temporary heating, if necessary, reads:

> 1. The Contractor shall provide temporary heating and covering as necessary and to the satisfaction of the Contracting Officer to protect all work and material against dampness and cold.
>
> 2. The Contractor shall furnish all necessary fuel and attendance to supply temporary heating sufficient to maintain a temperature not less than 50 degrees F. throughout each building from the time plastering is commenced until the building is accepted. For such purposes the Contractor shall supply such heating equipment as may be required and/or he may utilize with the approval of the Contracting Officer the heating equipment to be installed under the Contract Documents, or such portions thereof as are ready and available, provided that he shall leave the same in proper and acceptable condition upon completion of the work. Salamanders or other open fires will not be permitted in the buildings (p. 10).

34. Had it not been for the delays hereinabove described, the entire job would have been completed by September 23, 1937, and the plaintiff would not have been required to furnish temporary heat during the fall and winter of that year.

The entire job was substantially completed by November 9. Except for the covering and painting of pipes in the heating system, there remained to be done only certain plumbing and electrical work of a minor character, and inspections.

Acting upon written assurance of the project manager in the field and of a special representative of the defendant from Washington, D. C., who had gone to Chicago to make an inspection, Contracting Officer R. E. Doherty, by letter to plaintiff forwarded November 30, accepted the work as of November 9 and certified that it had been completed as of that date. Thereafter Doherty was succeeded as Contracting Officer by H. L. Campbell.

35. On October 2 plaintiff wrote to the defendant calling attention to the fact that as a result of delays in furnishing drawings, temporary heat would be required and requested that the defendant furnish the heat. On October 12 the defendant wrote to plaintiff stating that under the specifications plaintiff was required to furnish such heat. On October 21 plaintiff replied to the defendant's letter of October 12, reiterating its demand that temporary heat be furnished at the expense of the defendant. On October 27, the defendant replied, again directing that the plaintiff make arrangements for heat, at plaintiff's expense. On December 3 the defendant assumed custody and maintenance of the property. Meantime, in order to prevent injury to the property from the cold and to maintain the temperature required by the specifications, plaintiff procured steam for the period November 9 to December 3, from the power plants on the south sector at a cost of $9,324.83.

On December 28, 1937, plaintiff requested the defendant to issue a change order for the cost of temporary heat from November 9 to December 3, and submitted a proposal of $7,739.58 therefor. A similar demand and proposal of January 5, 1938, revised the sum claimed to $8,472.30. On January 31, 1938, the defendant wrote to plaintiff rejecting the demand and returning the proposal. On February 2 plaintiff wrote to the Administrator of the United States Housing Authority, successor to the Federal Emergency Administrator of Public Works, defined in the contract as "Head of Department" for the purpose of appeal, protesting the ruling of January 31, and requesting that a change order be issued. On February 23 the Acting Director of Federal Construction replied for the Administrator and denied plaintiff's demand of February 2. On March 19 the Acting Direc-

tor again wrote to plaintiff and, referring to the letter of November 30, 1937, from the then Contracting Officer, Doherty, stated that Doherty's letter of November 30, accepting the property as being substantially completed November 9, was not justified by the facts, and further asserted that December 3 was the date of acceptance.

36. On March 22 plaintiff protested in writing to the Acting Administrator against the decision and on March 24 appealed in writing to the Administrator from the decision of February 23. On May 18 the Administrator rejected plaintiff's claim for the cost of temporary heat and found as follows:

> 1. That on November 3, 1937, you notified Mr. H. A. Gray, former Director of Housing, that you would be ready on November 12, 1937, for final inspection of the work in your contract, and you requested that such inspection be made at that time;
>
> 2. That on November 9, 1937, the Government field representatives reported that your contract could then be considered substantially complete;
>
> 3. That on or about November 9, 1937, final inspection of your contract work by Government representatives started, resulting in the development of Punch Lists of items of unfinished contract work;
>
> 4. That during the month of November, specifically on the dates of November 18, 19, 22, 23, 24, and 26, you notified the Project Engineer, Mr. D. D. Meredith, that the remaining items on the final Punch List for certain buildings had been completed and you requested final acceptance of the particular buildings mentioned in each of your letters; that, in your letter of November 26, you also notified the Project Engineer that—"all items are now completed on all of our buildings and are ready for final acceptance";
>
> 5. That on November 30, 1937, an undated letter was forwarded to you signed by Mr. R. E. Doherty, former Contracting Officer, which stated that it confirmed the acceptance of your work on November 9, 1937, subject to certain conditions and requirements;
>
> 6. That as of November 30, 1937, the Authority had not accepted your work, therefore the former Contracting Officer could not confirm an acceptance;
>
> 7. That during the period November 9 to November 29, 1937, alone, our records show that you employed a daily average of about eighty-six (86) men at the project, in connection with the completion of your contract;

8. That on December 1, 1937, you addressed a letter to Mr. R. E. Doherty, former Contracting Officer, that there were still a few items of contract work unfinished, but that they were of such a nature as not to prevent Government use and occupancy of the buildings, and you requested immediate acceptance of the project.

9. That on December 3, 1937, the Government did actually take over from you the possession of the premises and relieve you of further maintenance of the buildings and utilities included in your contract;

10. That on January 28, 1938, and not before, did you complete all Punch List Items in accordance with contract requirements;

11. That on January 31, 1938, Mr. E. C. Curtis, Acting Project Manager, acting under instructions of the present Contracting Officer, Mr. H. L. Campbell, wrote you that the Government did not contemplate reimbursing you for maintenance expenses incurred by you prior to December 3, 1937, the date the United States Housing Authority actually took possession of the work under your contract;

12. That on February 2, 1938, you protested, under Section 10, Paragraph 2, of the General Conditions of the Specification, the ruling contained in the Acting Project Manager's letter to you of January 31, 1938, as being unfair and not in accordance with the terms of the Contract or Specification, and asked that a Change Order in the amount of Eight Thousand Four Hundred Seventy-Two Dollars and Thirty Cents ($8,472.30) be issued;

13. That on February 23, 1938, the Contracting Officer advised you that it was his final decision that no such Change Order should be issued;

14. That on March 19, 1938, for the purpose of clearing up the discrepancy in the records concerning the date of acceptance, you were informed by the Contracting Officer that the correct date of acceptance of your contract work was December 3, 1937, and not November 9, 1937, as stated in letter from the former Contracting Officer, forwarded to you November 30; and

15. That the Authority was not obligated under the contract to accept your contract work until it was entirely completed.

In failing to give any consideration to the delays which created the necessity for the temporary heat and to the nature of the work performed between November 9 and December

3, the defendant deprived the plaintiff of its right under the contract to an administrative consideration and decision of the question, if the contract required the defendant to give the plaintiff such a decision.

LAUNDRY TABLES

37. The contract drawings showed the location of certain laundry tables in basements, but neither the drawings nor specifications showed the character, design, dimensions, or materials from which the cost of such tables could be estimated or the tables could be fabricated and installed, or showed the tables in such a manner as to indicate that it was intended that they should be included in the work required under the base bid. In other instances where locations of similar household equipment, such as ironing boards, kitchen cabinet, kitchen work tables, gas plates, and electric refrigerators, were shown on the drawings and were required to be furnished by plaintiff under the contract, the specifications described the equipment with particularity. The defendant, nevertheless, directed plaintiff to construct and install tables at the locations indicated as a part of the work under its contract.

Plaintiff installed the tables at a cost of $496.34, duly protested in writing to the Contracting Officer against being required to furnish the tables without additional compensation and demanded compensation for them. On December 1, 1937, the Contracting Officer advised plaintiff in writing that it was his final decision that plaintiff was required to furnish such tables under the contract. Plaintiff did not take an appeal from this decision to the head of the department.

TREE PITS

38. Under the plans and specifications tree pits were to be made by digging holes and filling them with a mixture of clay and sand in preparation for the later planting of trees by the landscape gardener. Contract drawings A & L-5, A-12, A-13, and A-14, show proposed tree pits between the sidewalk and the street curb on Clybourn Avenue. This area is outside the property line of the project, as is shown by Property Line Map No. A-4. The proposed tree pits are

indicated on the drawings in the same manner as tree pits inside the property line and plaintiff had as much information about those outside the line as those inside the line. Plaintiff prepared all tree pits inside the property line as part of its contract work. All the foregoing drawings are in evidence as a part of the defendant's exhibit R, and are made a part of these findings by reference.

39. February 24, 1937, the defendant ordered plaintiff to grade the area between the sidewalk and the curb on Clybourn Avenue, which grading was not a part of the contract work and about which grading there is no dispute. The order also directed plaintiff to omit the preparation of tree pits in the area. Plaintiff performed the work and submitted a proposal in which it specified a price of $959.17 for the grading, which, with overhead and profit, totalled $1,158.18. Plaintiff also stated that no credit on the contract price would be allowed to the defendant for the omission of the tree pits, because preparation of tree pits in that area was not a part of the contract work.

March 23, 1938, the Contracting Officer issued Change Order No. 56, increasing the contract price by $219.82. In his letter to plaintiff transmitting the change order he stated his computation of the price increase as follows:

> The computation on which the Change Order is based is as follows:

Additional work as itemized by your proposal		$957.17
Credit for omission of tree pits:		
330 cubic yards excavation at $1.35	$445.50	
330 cubic yards clay fill at $1.00	330.00	
		775.50
		181.67
Overhead, 10%		18.17
		199.84
Profit, 10%		19.98
		219.82

The Contracting Officer also stated in his letter that it was his final decision that the tree pits were originally included in the contract and that the defendant was, therefore, entitled to credit when they were omitted from the work.

On March 25, plaintiff protested this decision by letter to the Contracting Officer and demanded the full sum of $1,158.18. On April 13, the Contracting Officer replied to plaintiff in writing and reaffirmed his decision of March 23.

40. On April 21, plaintiff appealed to the Head of the Department from the Contracting Officer's decision of March 23, as reaffirmed by his letter of April 13. July 25, the Head of the Department made his findings of fact and determined that the tree pits in the area in question were included in the contract price.

41. The specifications at page 67 read, in part:

> EXCAVATING, FILLING, AND GRADING
>
> * * * * *
>
> SEC. 1. Scope of Work.
>
> 1. The work includes all labor, materials, equipment, and services necessary to do all excavating, filling, and grading (except that part covered by the foundation contract) required to fully complete the project as shown on the drawings and as specified (see General Work).
>
> * * * * *
>
> SEC. 2. Materials.
>
> 1. Material for filling tree pits, planting areas, vine pockets, and the top 6-inch layer of the subgrade in all unsurfaced areas shall be clean yellow clay containing fine sand and shall be free from coarse sand, gravel, cinders, or other foreign matter.
>
> * * * * *
>
> 3. Material for filling (except filling for tree pits) at depths *greater than 2 feet* below subgrades shall be entirely free from junk and rubbish but may contain cinders, slag clinkers * * *.

The general description of the work appears on page 25 of the specifications under two heads: (1) The Project Site and (2) The Scope of the Work, as follows:

> SEC. 1. The Project Site.
>
> 1. The Project Site for Base Bid No. 1 shall include the entire area *north* of the north line of Diversey Parkway within the property lines as indicated on the Property Line Map No. A-4.
>
> SEC. 2. Scope of The Work for Base Bid No. 1.
>
> 1. The Bidder shall include in his proposal for Base Bid No. 1 all labor, materials, equipment, and services

> necessary for or incidental to the completion of the North Sector of the Project in accordance with the Drawings and the Specification, except the following: [Tree pits are not mentioned in the exceptions.]
>
> * * * * *
>
> NOTE B.—All work indicated on the drawings and/or specified to be done on or in the streets abutting the Project Site *shall be* included in the *Base Bid* No. 1.

The specifications, at page 75, read in part:

> STREET AND YARD IMPROVEMENTS
>
> SEC. 1. Scope of work.
>
> (d) On Diversey Parkway and Clybourn Avenue the only street work covered by this Division of Specifications consists of closing, (by construction of sidewalk, curb and gutter, etc.) the existing driveway entrances and provision of new driveway entrances as indicated on the drawings.

Article 2 of the contract reads in part:

> Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both.

The tree pits in the area in question clearly appear in the drawings, and the decisions of the Contracting Officer and the Head of the Department with respect thereto were right.

42. The following is a summary of costs to plaintiff because of delay caused by the defendant as set forth in preceding findings, not including interest on deferred payments:

	Not including general office overhead	Including general office overhead	
		Not including increases in officers' salaries	Including increases in officers' salaries
Delay, Forms (finding 25)	$4,853.24	$4,853.24	$4,853.24
Delay, Drawings (finding 26)	12,204.96	12,204.96	12,204.96
Delay, Compensation for equipment (finding 27a)	1,645.00	1,645.00	1,645.00
Delay, Rental of equipment (finding 27b)	402.32	402.32	402.32
Delay, Steam for testing (finding 28)	2,442.39	2,442.39	2,442.39
Delay, Temporary heat (finding 35)	9,324.83	9,324.83	9,324.83
General office overhead (finding 30)		11,433.60	17,222.40
Total	30,872.74	42,306.34	48,095.14

43. The change orders extending the time of completion to December 6, 1937, were agreed to by plaintiff, without protest as to the amounts therein recited; each such change order contained the following clause, to wit:

> This Change Order expressly satisfies any and all claims against the United States of America and the United States Housing Authority of whatever nature or purpose incidental to or as a consequence of the change herein described.

In agreeing to the change orders, it was not the intention of the parties that any questions or disputes arising under the contract, and not relating to the subject matter of the change orders, should be compromised or waived by the granting or acceptance of the change orders.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff on September 3, 1936, made a contract with the United States Public Works Administration for the construction of the superstructure of the north sector of the Julia C. Lathrop Homes in Chicago, Illinois, for a consideration of $2,097,600. The contract obligated the plaintiff to complete the work within 365 days after the receipt of notice to proceed. Notice was received on September 23, 1936, which fixed the completion date as September 22, 1937.

The plaintiff made a plan for the orderly and economical performance of its work. It was to build 17 buildings, containing in all 484 apartments with a total of 1690 rooms. Eleven buildings were to be 3 story buildings, five 2 story and one, the administration building, one story. The outside foundation walls had already been built. The sequence of the work in each building was first to place the interior foundation columns and the concrete slabs of the first floors which were to rest on the foundation walls and columns; then build up the brick exterior walls backed with tile, and the interior partitions; then place the interior columns to support the second floor and pour the concrete slab of that floor, resting it on the walls and columns; then build up the exterior walls to the next floor, and so on to the concrete

slab roof, covered with insulation, paper and tar, and the parapets and penthouse on top of it. Plastering, wood finishing, and painting were to be done when the buildings were enclosed.

The plaintiff planned to move its gangs of labor of the various trades, its machines, and its form lumber, from one building to the next, while waiting for the concrete of each floor to dry sufficiently to permit the placing of the next tier of walls on that floor. It planned to carry seven buildings along in that sequence. But it was seriously delayed, almost at the outset, by the Government's failure to furnish full size drawings showing how the stone trim for the front entrances of the buildings was to be shaped. Without these drawings the plaintiff could not prepare its shop drawings for the manufacture of the stone; the stone could not be manufactured; and the plaintiff could not complete the exterior walls of even the first floor of the buildings, nor any work coming after that in sequence. Though it was obvious when the contract was made that the full sized drawings would be needed even before the work began, in order to enable the plaintiff to obtain the stone by the time it would be needed, the first of them arrived on October 30, fifty-seven days after the date of the contract and thirty-seven days after the plaintiff had been directed to proceed with the work. When the first full size drawings were received they were for only a part of the buildings, the buildings they related to were not contiguous, and the drawings were incomplete even as to some of the buildings to which they related. The plaintiff had tried in the meantime to avoid some of the delay by improvised procedures but was not permitted to do so.

We have found that as a consequence of the defendant's delay in furnishing the full sized drawings, the plaintiff was delayed forty-seven days in completing its work. The proved damages resulting from this delay were the costs of job and main office overhead; the cost of having its machinery tied up on the job; the cost of additional form lumber which the plaintiff was obliged to buy because its plan of work was disrupted; and the cost of furnishing heat to the buildings for a period at the end of the contract, after the time when

the plaintiff would have had the job completed and turned over to the Government, but for the delay.

The completion of the job was further delayed by the failure of the Government to have steam available for the cleaning and testing of the pipes and radiators installed by the plaintiff. The boilers for the heating system were in the south sector of the project, built by another contractor. The steam was brought from the boilers by mains to the plaintiff's sector, and was there transmitted to the equipment installed by the plaintiff. The contract provided that the steam should be turned into the equipment installed by the plaintiff, first to clean it, and then to test it. But the steam could not be turned in until electricity was available to operate the stokers at the power plant and the motors in the vacuum pumps on the steam lines. The plaintiff was ready for the steam tests about September 13, 1937, or would have been except for unreasonable delay by the defendant in making up its mind that electric wire heavier than that specified would be required to operate the pumps. But no steam was available until October 13 because the public utility company which was to supply the electricity did not connect its lines to the project until October 12. We have found that the reason it did not do so was because the Government had not signed a contract with the utility company arranging for the service. The Government says that this finding is based upon hearsay testimony. The testimony was hearsay, but it was not objected to, and the Government had ample opportunity to prove the true facts if they were different from the testimony. Hence our finding is based not only on the hearsay testimony, but upon the corroborative fact that it stands uncontradicted. For the Government to delay the completion of the project for 17 days, as we have found, by failing, without explanation, to make arrangements with the public utility company for electric service, was a breach of contract. We have found that damage to the plaintiff resulted from this delay, and have awarded compensation therefor.

The plaintiff seeks to recover the cost of certain laundry tables which it was directed to install, though the specifica-

tions were ambiguous and, the plaintiff asserts, did not require the contractor to install them. The contracting officer decided the question against the plaintiff. The plaintiff did not appeal to the head of the department, as it had a right to do under the contract. It cannot, therefore, obtain relief here, even if the contracting officer's decision was wrong, which we do not decide.

The plaintiff complains that in change order No. 56, which required grading of the area between the sidewalk and the curb on Clybourn Avenue, not required by the original contract, the Government deducted from the compensation for the grading the cost of preparing certain tree pits in the area which, the Government said, the plaintiff was required by the contract to do, but which, the plaintiff says, it was not required to do. The contracting officer and the head of the department on appeal decided this question against the plaintiff, rightly, we think. The plaintiff's contention is highly technical. The contract drawings showed the proposed tree pits, as well as others elsewhere on the project. But the area, between the sidewalk and the curb, where these pits were shown was outside the property line of the project, as shown by a Property Line Map. We have no doubt that the plaintiff, when it bid on the project without seeking a clarification of this contradiction, expected to have to prepare the pits. If so, the officers were right in deducting their cost when the work was omitted.

In computing the plaintiff's damages resulting from the delays caused by the Government's breaches of contract, we have included certain elements to which the Government objects, and omitted others for which the plaintiff contends. We have included compensation for machinery owned by the plaintiff and rendered idle by the delay, and have, because of the absence of wear and tear upon it, awarded one-half of the fair rental value of it. *Brand Investment Company* v. *United States*, 102 C. Cls. 40, certiorari denied, 324 U. S. 850, February 26, 1945. We have included a proportionate part, in this case substantially all, of the plaintiff's main office overhead for the period of the delay. *Brand Investment Company* v. *United States*, *supra.* In computing

the main office expense we have not included a large increase in the salaries as officers of the four members of the Ericsson family who owned the plaintiff corporation. The increase was not made until after November 1, 1937, when the work was substantially completed, and was then made retroactive to January 1, 1937. It was made more as a distribution of profits than as a normal compensation for services rendered, so far as the proof shows.

The Government asserts other impediments to the plaintiff's right to recover. It says that, since the work was completed within the contract time, as extended by change orders, any delay caused by the Government cannot be regarded as a breach of contract. The original completion date was September 22, 1937. During the progress of the work the Government gave the plaintiff several change orders, each extending the time for performance by a specified number of days, the total extensions aggregating 74 days. Some of these change orders involved new or different work. One merely gave more time because of a strike of plasterers. There was no relation between these change orders and the delays which we have found to be breaches of contract. The changes covered by the orders did not in fact delay completion of the work by seventy-four days, or any other substantial period of time. They were not given by the Government, or accepted by the plaintiff, as a compromise or settlement of any dispute between the parties as to whether there had been delays, involving breaches of contract, not related to the subject matter of the change orders. In these circumstances the acceptance of the change orders does not foreclose the plaintiff from a remedy for breaches of contract which in fact delayed and damaged it. The Government urges that we held otherwise in the case of *Leo Sanders* v. *United States*, decided May 7, 1945. [*Ante*, p. 1.] But in that case we concluded that the change order was intended, as regarded the additional time given, to foreclose any question between the parties as to the duty to complete, or the right to complete, the contract earlier than the date designated for completion in the change order. In the instant case we do not think there was any such intention.

The Government contends that the plaintiff is foreclosed from recovery for the cost of heating the buildings for the period from November 9 to December 3, 1937. We have found that the reason why the plaintiff was still on the job and responsible for the temperature in the buildings at that time was because the Government had delayed the plaintiff in connection with the stone work and the turning on of the steam. The contract made the plaintiff responsible for the temperature in the buildings until the Government accepted the work as completed. The plaintiff asked for a change order compensating it for the cost of the heat during the period in question, asserting as a reason the fact that it would have been finished and gone but for the delays caused by the Government. The contracting officer refused the change order and the plaintiff appealed to the head of the department. He made fifteen numbered findings, none of which related to the plaintiff's contention as to the reason why it has been subjected to this expense. We find no indication in this decision denying the plaintiff's claim that the officer who decided it was aware of the basis of the claim. In those circumstances we cannot say that the plaintiff has had the hearing and decision to which the contract entitled him, and is foreclosed from coming here. We see no point in applying words such as "arbitrary," "capricious," or "bad faith," which are obviously inapplicable, in order to reach the result which justice demands. We think that unawareness of the problem on the part of the deciding officer is an equally good reason why his decision should lack finality. We do not decide whether his decision would have been final if he had been aware of the problem and had intended to decide it.

We conclude that the plaintiff is entitled to recover $42,306.34.

It is so ordered.

WHITAKER, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

Syllabus

OREGON-WASHINGTON BRIDGE COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 45760. Decided October 1, 1945]

On the Proofs

Claim under the Act of August 16, 1937, for alterations to bridge on Columbia River necessary for navigation purposes as result of Bonneville Dam construction.—Where plaintiff accepted from the Government the lump sum of $252,831.00 in compromise settlement for the flowage easements over plaintiff's lands in connection with the construction of the Bonneville Dam on the Columbia River and gave title thereto, releasing the Government from all claims for damages except any claims "that may hereafter be presented for the cost of altering its bridge to provide such clearance for sea-going vessels as the Government may hereafter require;" and where there was no itemization of the amount offered and paid by the defendant and no understanding or agreement between the parties as to what items or amounts should go to make up the total to be paid; it is *held* that the Government was precluded, in the absence of fraud or mistake, from later claiming the right to deduct from such navigation alteration costs any portion or item of the amount previously paid in compromises of other claims of plaintiff for compensation.

Same; no exceptions made in 1937 Act.—The Act of August 16, 1937 (50 Stat. 648) 15 months after the compromise settlement of $252,831.00, the provisions of which were well known to the War Department during its consideration, made no exception as to full reimbursement to plaintiff "for the actual cost of such alterations," and the War Department was not authorized to reopen the compromise settlement agreed upon May 25, 1936, and deduct $14,000.00 of the amount previously paid plaintiff thereunder from the actual costs due plaintiff under the 1937 Act, for expenses incurred in navigation alterations, and the plaintiff is entitled to recover.

Same; recovery for engineering expenses.—The plaintiff is entitled to recover on its two claims, for $4,052.35 and $4,946.49, representing amounts paid by plaintiff to its president for engineering services actually performed by him in connection with alterations to its bridge for navigation purposes, where these expenses were necessary and were actually paid, and are shown by the evidence to be reasonable.

The Reporter's statement of the case:

Mr. Charles T. Donworth for plaintiff.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover $22,998.84, consisting of three items of (1) $14,000 erroneously deducted by the War Department from the cost to plaintiff of altering its bridge across the Columbia River so as to provide for navigation, pursuant to the act of August 16, 1937 (50 Stat. 648); (2) $4,052.35, balance due for engineering services on alteration of piers; and (3) $4,946.49, balance due for engineering services with reference to construction and installation of a lift span.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of Washington and has been the owner and operator of a toll bridge across the Columbia River at Hood River, Oregon.

Claim for $14,500 Deducted by Defendant from Payment for Net Construction Costs Under the Act of August 16, 1937

2. The bridge was built by plaintiff in 1923 and 1924. Construction of Bonneville Dam, situated downstream from the bridge, was commenced by defendant in 1934 and a controversy ensued as to whether defendant would be liable to plaintiff for the cost of reconstructing the bridge so as to make it safe against the pressure of ice at the heightened water level in the pool to be created by the dam. At the same time discussion arose concerning the nature and the cost of altering portions of the bridge so as to afford passage to seagoing vessels. The defendant contended that it would be liable only for damages occasioned by flooding shorelands; that the United States could, without compensating plaintiff therefor, require plaintiff so to alter the bridge as to prevent it from obstructing navigation. Plaintiff denied that the necessity for reconstruction was due to the needs of naviga-

tion. It contended that the dam was being built to a greater height than actually needed for navigation; that the extra height created the condition requiring reinforcement and alteration of the bridge; that such extra height was for the primary purpose of developing hydroelectric power; and, this being the object, the admitted servitude for purposes of navigation was not involved and the United States was obliged to compensate plaintiff.

Since its completion in December, 1924, plaintiff has kept the toll bridge in continuous operation for public travel, including the period when the lift span was being installed and when piers 8 and 9 were being reinforced, as hereinafter mentioned, to support the lift span.

3. The matters mentioned in the preceding finding were discussed at various times by representatives of the parties, and at a conference on May 22, 1936, representatives of defendant proposed that the defendant pay to plaintiff the sum of $250,000 in full for flowage easements, it then being contemplated that such easements would be condemned by action in the United States District Court and the damages stipulated. Defendant's offer was based upon its own estimate, which was not communicated to plaintiff, of cost of reinforcing the bridge to withstand ice pressure at the proposed new levels, which estimate included, among various others, the following items:

Reinforcing Pier 8 with block on base and ice breaker	$12, 500
Ice breaker on Pier 9	1, 500

Plaintiff's estimate of the cost of reinforcing piers 8 and 9 against ice pressure was $3,500 to $4,000, but its estimate for the entire bridge was substantially higher than that of the defendant. The evidence does not satisfactorily indicate which estimate as to piers 8 and 9 was more nearly correct.

Various estimated items of reinforcement and additional construction were discussed at the time of defendant's offer, but no copy of defendant's estimate was then given to plaintiff and it does not appear from satisfactory evidence that the items relating to piers 8 and 9 were called to the attention of plaintiff's representative prior to culmination of the negotiations for flowage easements.

The amount offered by defendant was shortly after increased by $2,831, being $100 an acre for 28.31 acres of riparian land belonging to plaintiff, making a total of $252,831 offered by defendant in full for flowage easements, which offer was accepted by plaintiff May 25, 1936, by telephone communication to defendant's Division Engineer at Portland, Oregon. This offer by defendant and its acceptance by plaintiff was a compromise settlement of all matters in dispute between the parties in connection with the flowage easements acquired by defendant.

Defendant's offers, first of $250,000 and later of $252,831, were based on its own estimates of the cost of reinforcing the bridge to withstand ice pressure at the proposed new levels.

The defendant's estimate, totaling $244,000 (which is in evidence as a part of exhibit 20-D), and the blueprint entitled "Revision of Hood River White Salmon Bridge over Columbia River" (exhibit 21) were both prepared by defendant subsequent to the conference of May 22, 1936, to-wit, on or after June 1, 1936, but no copy of either the estimate or the blueprint was submitted to plaintiff until about December 3, 1937, more than eighteen months later. In said estimate an item of $60,000 was included by defendant for six steel trusses or spans. In the conference of May 22, 1936, above referred to, defendant's representatives had verbally allowed $108,000 for these trusses or spans. The actual cost of installing them was approximately $120,000, which was double the amount allowed therefor in defendant's estimate. The $252,831 subsequently paid by defendant to plaintiff for the flowage easements fell far short of meeting the costs of the work outlined in defendant's blueprint (exh. 21).

At the conference on May 22, 1936, hereinbefore referred to, plaintiff's estimate of the cost of the necessary alterations of the bridge, including those necessary to withstand ice pressure at the proposed new water level, was in excess of $500,000. At that conference, as a result of a suggestion made by the representative of defendant with respect to shoring up the piers (which suggestion was incorporated in the blueprint, exhibit 21), plaintiff reduced its estimate of cost to $365,000.

In April 1938, while plaintiff was endeavoring to persuade the War Department to pay the $14,000 item which had been deducted from Voucher No. 2587 as described in findings 10, 11 and 12, plaintiff's president and engineer, E. M. Chandler, at the suggestion of the Chief of Engineers, prepared an estimate of the cost of reinforcing pier 8 against ice pressure only. This estimate, amounting to $3,500, was submitted to Col. Robins as suggested by the Chief of Engineers but nothing was done about it.

4. June 20, 1936, the Secretary of War approved the following recommendation of the Chief of Engineers:

> 1. The Bonneville Dam now under construction in the Columbia River will, when placed in operation, cause a substantial rise in water levels at the site of the Interstate Bridge between Hood River, Oregon, and White Salmon, Washington. The bridge is owned by the Oregon-Washington Bridge Company, which also owns a small parcel of land at each end of the structure upon which portions of the approach roadways, toll houses and other appurtenances utilized in the maintenance and operation of the bridge are located.
>
> 2. The lands of the bridge company, including the roadway approaches thereon, will be submerged by the pool of the dam and a flowage easement must be acquired on said lands. A portion of the trestle approaches, situated on the company's property above the ordinary high water lines, must be raised to place it a safe distance above the new water levels.
>
> 3. The main bridge structure was not designed to withstand the pressure of ice at the higher elevations to be created by the dam. Reinforcement and strengthening of the structure will be necessary to make it safe after the pool is raised, and this work should be done before the dam is placed in operation. Otherwise, it will be difficult and more expensive, and there will be danger of serious damage to the bridge and interruption of traffic.
>
> 4. The bridge company represents that it is not in a position to raise the necessary funds to do this work. It contends that the price which the Government pays for the flowage easement over its lands should include the cost of all alteration and reinforcement of the bridge structure necessitated by the increased water levels, and urges that payment be made promptly so that the money can be used by the company to make the necessary

changes in the bridge before the dam is placed in operation and the water level is raised. The company's contention is based on the theory that the dam is being built to a greater height than is actually needed for navigation and that this extra height, which is the real cause of the damage to the bridge, is primarily for power development. Under this theory it is urged that the Government's servitude in favor of navigation on property within the high water lines does not apply. A further argument in support of the company's contention is that since some of its property above high water is unquestionably being taken, the proper measure of damages for such taking includes all damage to the remainder of the company's property (including the bridge structure) used in connection with that actually taken. The company estimates the damage at $500,000.00 or more.

5. The filing of a condemnation suit without an agreement as to the sum to be awarded will undoubtedly precipitate a prolonged legal controversy, which, if decided in favor of the bridge company's contention, will result in a judgment against the Government in an amount up to $500,000.00. If no steps are taken to acquire the flowage easement on the bridge company's property prior to completion of the dam and the project is then placed in operation the company may be expected to file an injunction proceeding. Such a proceeding might delay the full utilization of the project for an indeterminate period. The Division Engineer reports that the dam could be operated so as not to interfere with existing navigation or the passage of fish, without flooding the roadway approaches or the upland belonging to the bridge company. Limiting the pool to such elevation would, however, result in almost complete loss of power head at the dam during high water, making it impossible to dispose of surplus power to any advantage.

6. Under the circumstances, the Division Engineer believes that the public interest will best be served by agreeing in advance of the filing of condemnation proceedings, on the amount to be awarded for the required easements. After extended negotiations with the President of the Bridge Company, he recommends that the Government agree to pay the sum of $23,874.00 for a flowage easement on the 2.6 acres of land at the Oregon end of the bridge, and the sum of $228,957.00 for the easement on the 26.44 acres at the Washington end.

7. It is the view of this office that there is merit in the Bridge Company's argument, and that litigation of the question, whether initiated by the Government in the form of a condemnation proceeding or by the Company in the form of an injunction proceeding, is very apt to delay the full utilization of the project, even though the legal questions involved are ultimately decided in favor of the United States. Accordingly, I concur in the view of the Division Engineer that settlement of the controversy by agreement is desirable. Condemnation will be necessary to obtain clear title even though agreement is reached on the price.

8. I recommend that the prices proposed by the Division Engineer, totalling $252,831.00, be approved, and that authority be granted to inform the bridge company that when it has agreed in writing to the entry of awards in the approved amounts in full satisfaction of all claims which said company may have on account of the construction, maintenance and operation of the Bonneville Dam, the Department will request the Attorney General to initiate condemnation proceedings to acquire flowage easements on its property.

5. While negotiations for the acquisition of flowage easements were pending, representatives for both parties knew that in order to accommodate seagoing vessels the bridge would have to be altered by installing a lift span, but that authorization and payment therefor must await Congressional action. The parties knew that piers 8 and 9 would have to carry the load of the lift span and therefore would have to be materially reinforced to an extent far exceeding and much different from the reinforcing that would have been necessary to provide against ice pressure alone.

Notwithstanding the impossibility of securing immediate Congressional authorization, representatives of the parties were agreed that reinforcement of piers 8 and 9 in a manner adequate to provide support for the anticipated lift span must be commenced without awaiting such authorization so as to finish the work before the water level was raised on completion of the dam. Therefore, in September 1936, and before final acquisition of the flowage easements had been consummated, reinforcement of piers 8 and 9 was commenced by plaintiff for the purpose of supporting the lift spans, and not for the purpose of providing against ice pressure alone.

Thereafter, and before completing the acquisition of flowage easements, defendant requested assurance from plaintiff that the money paid in consideration for the easements would be utilized to reinforce the bridge and would not be used to retire pre-existing indebtedness. Accordingly, on December 2, 1936, plaintiff assured defendant in writing that the $252,831, so far as the amount would go, would be expended on alterations and reconstruction of the bridge. This letter listed seven general items, but did not include the items for reinforcing piers 8 and 9 against ice pressure as listed in defendant's estimate at the time it made its offer of settlement. Defendant accepted the deeds for the flowage easements and paid the consideration without further requirements in this respect, knowing that piers 8 and 9 would be reconstructed and not merely reinforced against ice pressure alone.

6. Instead of condemning the flowage easements, defendant decided to take deeds of flowage easements over plaintiff's land. One deed described the land on the Washington side of the river and recited a consideration of $228,957. The other described the land on the Oregon side of the river and recited a consideration of $23,874. Otherwise the deeds were identical, and each contained the following provisions:

> THAT WHEREAS, the Government is constructing a dam across the Columbia River between the States of Oregon and Washington at Bonneville, Oregon, and upon the completion of said dam will operate and maintain a spillway, power house and ship lock; and
>
> WHEREAS, under operating conditions, all lands abutting on either bank of said river from Bonneville to the Celilo Canal which are below the elevation of the backwater curve which begins at the dam at 72.0 feet above mean sea level (as determined by reference to the U. S. C. & G. S. bench mark, B. 24, situate about one mile east along the Oregon-Washington Railroad & Navigation Company's track from Warrendale, Multnomah County, Oregon, in the north end of a concrete culvert, at elevation 72.533 feet) will be permanently flooded; and
>
> WHEREAS, the Government in operating said structures, will increase periodically the depth and duration of the overflow on a portion of said lands, later described, lying above elevation 72.0 feet; and

WHEREAS, the Government desires to purchase a perpetual flowage easement from the said Grantor and said Grantor desires to sell said perpetual flowage easement to the Government;

NOW, THEREFORE, the said Grantor, for and in consideration of the sum of Two Hundred and Twenty-eight Thousand Nine Hundred and Fifty-seven and no/100 Dollars ($228,957.00) cash in hand paid by the Government, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey to the Government, or its assigns, forever, the full and perpetual right, power, privilege and easement to overflow as hereinbefore stated, all of the following described lands:

[Description of land]

TO HAVE AND TO HOLD unto the Government, or its assigns, forever, together with the right to go upon the lands above described from time to time as the occasion may require and remove therefrom the timber and other natural growth, and any accumulations of brush, trash, or driftwood;

And the said Grantor and its successors and assigns covenant that it is in the quiet and peaceful possession of said lands, and that it will defend the title to the right, power, privilege and easement hereby granted and conveyed, as aforesaid, to the Government or its assigns, against the lawful claims of all persons whomsoever.

And the said Grantor, in consideration of the above specified sum, also hereby releases the Government from all claims for damages that have accrued or may hereafter accrue to it by reason of the construction, maintenance and operation of the Bonneville Dam, except any claims (whether valid or invalid—and the Government does not recognize the validity of any such claims) that may hereafter be presented for the cost of altering its bridge to provide such clearance for sea-going vessels as the Government may hereafter require.

The deeds were executed and delivered, subject to approval of title, November 21, 1936, and plaintiff received payment of the consideration April 30, 1937.

The final paragraph of the deeds, as above quoted, containing the release clause and the exception thereto, was placed in said deeds at the insistence of the Chief of Engineers who wrote to Col. Robins on October 13, 1936, as follows:

> The plan of settlement proposed by the attorneys for the bridge company is acceptable to this department. The form of the instrument submitted herewith is satisfactory except that the next to the last paragraph of the easement deeds should be changed to read as follows: * * *.

The deeds of flowage easements were executed by plaintiff and delivered to defendant and were accepted and paid for by defendant as a final settlement and compromise of all disputes then existing between the parties with respect to construction, maintenance, and operation of the Bonneville Dam (except possible future claims for navigation alterations).

At the time of execution and delivery of the deeds and at the time the consideration therefor was paid by the defendant to plaintiff Congress had not authorized any navigation alterations to plaintiff's bridge and no authority existed for the allocation by defendant of the $14,000 item previously paid for navigation alterations to the bridge.

7. August 16, 1937 (50 Stat. 648) the following act of Congress was approved:

> That the Secretary of War be, and he is hereby, authorized and directed to cause such alterations in existing bridges across the Columbia River at Cascade Locks and Hood River, Oregon, as will render navigation for ocean-going vessels in the pool formed by the Bonneville Dam reasonably free, easy, and unobstructed, and to reimburse the owners of said bridges for the actual cost of such alterations from appropriations heretofore or hereafter made for maintenance and improvement of rivers and harbors.

8. Pursuant to this act, the Secretary of War on September 9, 1937 wrote to plaintiff directing it to install a lift span in the bridge and stating that plaintiff would be reimbursed for the cost of such alterations.

9. Meantime, under the supervision of and with the consent of representatives of the defendant, plaintiff already had been engaged in the work of reinforcing piers 8 and 9 to make them strong enough to support the lift span which it was anticipated, when the settlement of May 25, 1937 was agreed to, would be authorized by Congress. Such reinforcement was substantially different from that which would have been required to reinforce against increased ice pressure alone. The primary purpose of the reinforcement, as actually done, was to provide proper and adequate support for the lift span, but when completed the piers were also strong enough to withstand the stress of ice pressure at the heightened water level.

10. September 23, 1937, plaintiff submitted to the District Engineer invoices for the portion of the work done on said piers up to August 24, 1937 (exclusive of engineering expense) in the amount of $31,890.08.

11. November 5, 1937, the District Engineer informed plaintiff that the War Department had approved payment of $31,890.08 less the sum of $14,000, which the Government then claimed had been included in the consideration ($252,-831) paid for the flowage easements and the releases contained therein.

This was the first intimation ever given plaintiff that any portion of the $252,831 consideration was considered by the defendant as payment for part of the work to be done in reinforcing piers 8 and 9 in order to support the lift span.

12. December 1, 1937, the plaintiff in order to be reimbursed for the undisputed items of cost incurred by it submitted to the District Engineer under protest a voucher covering the actual cost of all the work on piers 8 and 9 prior to that date in the total amount of $56,929.19 less the item of $14,000. Subsequently defendant paid plaintiff $42,929.19, being the amount claimed in this voucher, less the amount of $14,000.

13. All the work performed by plaintiff and covered by the vouchers above mentioned was necessarily performed pursuant to the act of Congress (finding 7) and under the direction of the Secretary of War. The cost thereof is a part

of the actual cost of alterations to the bridge necessary to render navigation reasonably free, easy, and unobstructed for ocean-going vessels in the pool formed by the Booneville Dam.

Claim for $4,052.35, Cost of Engineering Expense on Piers 8 and 9

14. In order to make alterations in piers 8 and 9 and to construct the lift span, plaintiff was required to obtain the services of an engineer qualified in the designing and construction of bridges. The engineering work involved difficult and unusual problems. Plaintiff employed E. M. Chandler to prepare plans and specifications and to supervise the construction, promising to pay him therefor an amount equal to ten percent of the net construction cost. This rate of compensation was usual and was reasonable for the work performed. Chandler was president of plaintiff corporation at all times here involved, and was also a qualified and licensed bridge engineer fully competent to perform the engineering services required. The engineering services performed by Chandler were in addition to his duties as president of the corporation.

15. Chandler performed such services and plaintiff paid him $10,514.70, that sum being ten percent of the net construction cost in altering piers 8 and 9. Chandler necessarily spent 180 days' time in performing his engineering services with respect to piers 8 and 9, and necessarily expended $5,225 in performance of said services for which no separate payment was made. The engineering services were satisfactorily performed and the amount paid to Chandler was not more reasonable compensation than for the engineering services rendered by him on piers 8 and 9.

16. Defendant's allowance of compensation for engineering services in the amount of $6,462.35 was based on the following scale of compensation: "5 percent of the construction cost for general engineering service; plus actual cost of material inspection and so much of the salary of the resident

engineer as may be determined as applicable to the reconstruction of piers 8 and 9."

This allowance by defendant was less than a reasonable compensation for the engineering service performed by Chandler. The reduction by defendant was not made because the engineering services were unsatisfactory. If plaintiff had employed an independent engineer and paid him the sum paid Chandler, the defendant would have reimbursed the amount in full.

Plaintiff accepted the $6,462.35 under protest and reserved its right to claim the balance of $4,052.35.

Claim for $4,946.49, Cost of Engineering on the Lift Span

17. Plaintiff paid $17,205.50 to E. M. Chandler for engineering services, that sum being ten percent of the net construction cost of installing the lift span. Chandler necessarily spent 166 days' time in performing his engineering services with respect to installing the lift span, and necessarily expended $14,098.69 for which no separate payment was made. The engineering services were satisfactorily performed and the amount paid to Chandler was reasonable compensation for the engineering services rendered by him in connection with installing the lift span.

18. Defendant declined to reimburse that portion of the $17,205.50 paid to Chandler in excess of $12,259.01.

The defendant's allowance for these engineering services was based upon five percent of the construction cost of the lift span plus the actual cost of material inspection, and so much of the salary of the resident engineer as was applicable to that work. This allowance was less than a reasonable compensation for the engineering services performed by Chandler. A compensation or fee of $17,205.50 was reasonable for the engineering services rendered by Chandler with respect to installing the lift span. Plaintiff accepted the $12,259.01 under protest and reserved its right to claim the balance of $4,946.49.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff, since 1924, has owned and operated a toll bridge across the Columbia River between Hood River, Oregon, and White Salmon, Washington. In 1934 defendant commenced construction of the Bonneville Dam across the Columbia River about twenty-five miles downstream from the bridge. During the three years from 1934 to 1936 a controversy ensued as to whether the defendant was obligated to compensate plaintiff for the cost of altering and reconstructing certain parts of the bridge, because of the construction of the dam, so as to make the bridge safe against increased pressure of ice at the new water level in the pool which was to be created by the Bonneville Dam. The Government advised plaintiff that when the dam was completed the elevation of the water at plaintiff's bridge would be twenty-seven feet higher than it had been under natural conditions.

Plaintiff took the position that the Bonneville project was not essentially a navigation project but was primarily a hydro-electric project and that consequently the Government was obligated to pay just compensation for damages to the bridge caused by the raising of the water. The Government took the position that it was under no obligation to pay plaintiff anything for the taking of property rights because the Bonneville project was primarily a navigation improvement and that plaintiff was entitled to no compensation for damages by reason of the raising of the water level.

As set forth in findings 3 to 6, inclusive, negotiations were carried on between the parties and conferences were held with reference to plaintiff's claim for compensation of $500,000. As a result of the negotiations the defendant, on May 22, 1936, offered plaintiff a lump sum of $250,000 for flowage easement in compromise and full settlement of plaintiff's claim by reason of the construction and maintenance of Bonneville Dam. On May 25, 1936, plaintiff advised defendant that if it would increase its offer to $252,831 plaintiff would accept it. This was agreed to, and that amount was paid April 30, 1937, after the execution and delivery by plaintiff of the flowage easement deeds of November 21, 1936.

This was definitely a compromise settlement of the matters in controversy between the parties. There were many items of value, costs, and expenses, in large sums, which both the plaintiff and the Government engineer obviously considered, but there was no itemization of the amount offered and paid by defendant and there was no understanding or agreement between the parties as to what items or amounts should go to make up the total to be paid. Plaintiff was not advised at any time prior to consummation of the settlement agreements and the payment of the compromise sum of $252,831 that any specific amount had been included therein by defendant for the cost of reinforcing piers 8 and 9 against ice pressure only. Moreover, as set forth in finding 5, both parties knew during the negotiations for settlement of plaintiff's claim that it would be necessary to install a lift span in the bridge at piers 8 and 9 to accommodate seagoing vessels in the pool created by the dam and that these piers would have to be altered and reconstructed to carry the load of this lift span, and that, in September 1936, before the settlement agreements of November 21 were prepared and executed, plaintiff agreed to and did proceed with the work of altering and reinforcing piers 8 and 9 for the purpose of supporting the lift span without awaiting action by Congress on the matter of reimbursement by the Government for this cost. In these circumstances plaintiff had no reason to believe and certainly there was no understanding or agreement that any portion of the sum paid in compromise and settlement of plaintiff's claim for compensation, other than for navigation alterations, would be deducted by defendant from the cost to plaintiff of such navigation alterations in the event Congress should later agree to reimburse plaintiff therefor. The release exacted by the Government and given by plaintiff in the deeds (finding 6), with the reservation by plaintiff of the right to claim reimbursement for the cost of navigation alterations to piers 8 and 9, precludes the Government, in the absence of fraud or mistake, from now claiming the right to deduct from such navigation alteration costs any portion of

the amount previously paid in compromises of other claims of plaintiff for compensation.

The act of Congress enacted August 16, 1937 (finding 7), fifteen months after the compromise settlement of $252,831, the provisions of which act were well known to the War Department during its consideration, made no exception as to full reimbursement to plaintiff "for the actual cost of such alterations."

For the reasons stated hereinabove, the War Department was not authorized to reopen the compromise settlement agreed upon May 25, 1936, and deduct $14,000 of the amount previously paid plaintiff thereunder from the actual costs due it under the act of August 16, 1937, and plaintiff is entitled to judgment for this amount.

The last two items of plaintiff's claim for $4,052.35 and $4,946.49 representing amounts paid by plaintiff to its president, E. M. Chandler, for engineering services actually performed by him in connection with piers 8 and 9 and the lift span (findings 14 to 18) are submitted by defendant on the facts without argument. These expenses were necessary and were actually paid. They are shown by the uncontradicted evidence to have been entirely reasonable. The engineering services involved were necessary in connection with the work required on the bridge structures, and had plaintiff employed an engineer outside its own organization the expenses for such services would have been at least as much as it paid its president therefor. Plaintiff is therefore entitled to recover on these two items a total of $8,998.84.

Judgment is entered in favor of plaintiff for $22,998.84. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

MINETTE G. STEIN v. THE UNITED STATES

[No. 45596. Decided October 1, 1945]

On the Proofs

Income tax; redemption of preferred stock equivalent to dividend under Section 115 of 1936 Revenue Act.—Where the plaintiff, at the time of the organization of the Puro corporation in 1926, acquired by subscription shares of its Class B 6% preferred $100 par value stock, at $100 per share, and received with each share of preferred one share of no par common stock without any further cash consideration; and where, beginning in 1932, in accordance with the articles of incorporation, and upon the order of the board of directors, approximately one-tenth of the Class B preferred stock was redeemed each half-year, so that by the end of 1936 most of the preferred stockholders had been paid four-fifths of the amounts originally paid for their stock, yet on January 1, 1936, the corporation had undivided profits considerably more than the amount originally paid for the Class B preferred and the common stock; it is *held* that the determination of the Commissioner that the payments made to plaintiff upon the redemption of her preferred stock in 1936 were, for tax purposes, the equivalent of dividends and were not returns of capital, under Section 115 of the Revenue Act of 1936, was correct and plaintiff is not entitled to recover.

Same.—The question of whether a distribution is "essentially equivalent to the distribution of a taxable dividend" under Section 115 (g), Revenue Act of 1936, does not depend on the presence or absence of honesty in the distribution; the statute makes it a question of equivalence, and if that is present the statute expressly taxes the distribution. See *Rheinstrom* v. *Conner*, 125 F. (2) 790.

The Reporter's statement of the case:

Mr. Llewellyn A. Luce for the plaintiff.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of Chicago, Illinois. She filed her individual income tax return for the calendar year 1936 on March 15, 1937, showing

a tax due of $24,277.02, which was paid in quarterly installments. The last installment of $6,069.25 was paid December 14, 1937. January 20, 1939, an additional assessment of $469.54, plus interest of $53.50, was made against plaintiff for 1936, which was satisfied February 1, 1939, by payment of $522.34 and abatement of 70 cents.

2. March 9, 1940, plaintiff filed a claim for refund of $7,945.59 paid for 1936, on the grounds (1) that the sum of $3,669.01, reported as interest on special assessment bonds issued by various municipalities, was not taxable, and (2) that the sum of $12,033.24, received as a result of the redemption of 120⅓ shares of Class B preferred stock by Puro Filter Corporation of Illinois, hereinafter called the Puro corporation, was not taxable. The Commissioner of Internal Revenue allowed plaintiff's claim for refund of tax paid for 1936 on the bond interest and refunded $2,201.29, together with interest thereon in the amount of $52.80. By letter dated October 9, 1941, he rejected plaintiff's claim for refund of the tax paid on money received by her for the redemption of the preferred stock.

3. In 1926 S. M. Stein, husband of plaintiff, secured an option to purchase all the stock of Chicago Water Purifying Company, hereinafter called the Chicago company, which had been engaged in selling and leasing water filters since about 1913. To finance the proposed purchase he caused the Puro corporation to be organized, with authorized capital stock issued as follows:

1,250 shares of Class A 7% preferred stock, par value $100.
2,680 shares of Class B 6% preferred stock, par value $100.
2,680 shares of common stock, no par value.

Practically the entire issue of Class B preferred stock was subscribed at par by Mr. Stein and friends and associates. Mr. Stein assigned his option to the subscribers for the Class B preferred stock and they in turn assigned the option to the Puro corporation, receiving in asserted consideration for the assignment 2,680 shares of common stock, which was distributed among them in proportion to their subscriptions for Class B preferred stock. The amount realized from subscrip-

tions for Class B preferred stock was paid to the stockholders of the Chicago company in part payment for the stock of that company, and the 1,250 shares of Class A preferred stock of Puro corporation was issued to them in payment of the balance of the purchase price.

4. As part of the agreement for the purchase of the Chicago company stock, provision was made in the articles of incorporation of Puro corporation requiring that each year for five years 250 shares of Class A preferred stock would be redeemed for cash, thus completely retiring in five years the 1,250 shares of Class A preferred stock which had been issued in part payment for the Chicago company stock. This provision was complied with, the last of Class A preferred stock of Puro corporation was retired June 30, 1931, and none has been reissued.

5. Provision also was made in the articles of incorporation of the Puro corporation for the redemption of Class B preferred stock upon order of the board of directors. The following circumstances contributed to a demand on the part of the investors in Puro corporation stock for such a provision. The option for the purchase of the Chicago company stock did not specify the price but granted merely the right to negotiate exclusively for a definite period of time. While negotiations were in progress there was a period of doubt whether the sale would be consummated. Some of the subscribers to Class B preferred stock considered that, even if the purchase of the Chicago company stock should be consummated, in some respects the investment was speculative or hazardous—the business fluctuated with good and bad times and, if the then current agitation for a general city filtration plant in Chicago should result in a municipally owned plant, it would materially and adversely affect the business of the Chicago company. Moreover, because the Puro corporation's assets would consist principally of water filters of a patented type, and refrigerating equipment, with little salvage value, which would therefore be valuable only so long as the corporation was an operating concern, banks would not agree to lend money to the Puro corporation without the endorsement of responsible stockholders or officers.

After all Class A preferred stock had been redeemed, the board of directors from time to time, as conditions permitted, ordered the retirement of Class B preferred stock, as follows:

Date	Number of shares redeemed	Amount paid out in redemption
June 30, 1932	268	$26,800.00
December 31, 1932	258	25,800.00
June 30, 1933	258	25,800.00
March 31, 1934	258	25,800.00
October 1, 1934	204½	20,450.00
December 31, 1935	267½	26,750.00
March 31, 1936	266	26,600.00
December 31, 1936	266	26,600.00

6. These redemptions were made pro rata among all the holders of Class B preferred stock, except as to the redemption of October 1, 1934. For that year holders of approximately 54 shares of Class B preferred stock declined to surrender their shares for redemption because they deemed the stock a good investment. Thereafter Class B preferred stock was called for redemption with the proviso that the stock called should cease to bear dividends after the redemption date and, in consequence, there were no more refusals to surrender for redemption.

7. All classes of stock had equal voting privileges. The stipulated dividends on preferred stock were cumulative and, in the event of liquidation or dissolution, the assets available for distribution to stockholders were to be applied first to the payment of accumulated dividends and retirement of the preferred stock at par, Class A having, while it remained outstanding, priority. After payment of accumulated dividends and retirement of all outstanding preferred stock at par, the assets remaining, if any, were to be distributed to the holders of the common stock.

There were some transfers of stock from the original subscribers, and some holders of preferred stock redeemed in 1936 were not, at the times of redemption, owners of common stock. The extent to which preferred stock and common stock were transferred separately is not shown by the evidence, and it can not be determined to what extent relative

ownership of outstanding stock was altered as Class B preferred stock was redeemed.

8. All redemptions of preferred stock were made from earnings and profits. No diminution of the corporation's business operations was planned, anticipated, or realized in connection with the redemption of the preferred stock, nor was there any modification of the charter reducing the amount of authorized stock.

9. The first dividend paid by Puro corporation on its common stock was on December 23, 1936, at the rate of $2.00 per share.

10. The corporation's business was consistently profitable and its earnings and profits were at all times in excess of the amounts paid for redemption and retirement of Class B preferred stock. The corporation had undivided profits on January 1, 1936, of $353,013.17, and the total amount paid out by the corporation in 1936, in redemption and retirement of Class B preferred stock, was $53,200.

11. The 120⅓ shares of Class B preferred stock which plaintiff surrendered for redemption, and for which she received $12,033.24 in 1936, were acquired by her as an original stockholder in the company. See finding 2. She also, at these times in 1936, was the owner of shares of the common stock of the Puro company. Whether these shares were those originally issued to her does not appear from the evidence. During 1936 plaintiff also surrendered for redemption certain Class B preferred stock purchased by her from other stockholders, but the amounts received therefor were not taxed as dividends.

12. Because of controversies with the Bureau of Internal Revenue in connection with the taxability of amounts paid for redemption of such stock, no redemptions of Class B preferred stock were made after December 31, 1936. The first receipts from redemption of Class B preferred stock were not reported as dividends in the income tax returns of the stockholders for 1932, but the Treasury Department took the position that the redemptions were dividends. A long controversy ensued, but the Treasury Department adhered to its position, and the stockholders did not petition the Board of Tax Appeals for redetermination. For the years following,

until and including 1935, both the taxpayers and the Treasury Department treated the redemptions of Class B preferred stock as payments of dividends in the determination of the tax liabilities of individual stockholders and the corporation. In its return for the calendar year 1936, the Puro corporation claimed credit, as dividends paid, for the amount of such redemptions of Class B preferred stock. The revenue agent in charge in Chicago recommended to the Commissioner of Internal Revenue that such credit be not allowed. The Commissioner by letter of January 12, 1943, advised the corporation that the claimed credit would be allowed in the event the distributions to the stockholders are held in the case at bar to be taxable to the stockholders as dividends. A 90-day deficiency letter dated June 16, 1943, advising the Puro corporation of additional tax due for the calendar year 1936, on the ground that the corporation was not entitled to such credit, was transmitted to the corporation. September 11, 1943, the corporation filed with the Tax Court of the United States a petition for a redetermination of the deficiency.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, at the time of the original formation of the Puro corporation in 1926, acquired by subscription shares of its Class B 6% preferred $100 par value stock, at $100 per share. With each share of preferred went a share of common stock of no par value. Neither the plaintiff nor any other stockholder paid any separate cash consideration for the common stock, though they assigned to the corporation an option for exclusive negotiation with the stockholders of the Chicago Water Purifying Company for the purchase of their stock, which option had been acquired by S. M. Stein, the plaintiff's husband, the moving party in the formation of Puro, and had been assigned by him to the small group of his friends and associates who subscribed for stock in Puro. The Chicago company had an established business of selling and leasing water filters.

The investors in Puro stock thought that their investment was somewhat speculative, as to the security of their capital since the physical property of the Chicago company whose stock they hoped to obtain was a specialized machinery which would have little salvage value if Chicago should, as it might, install a municipally owned filtration plant. They also were aware, at the time they subscribed for their stock, that the purchase of the Chicago company's stock might fall through, in which case they would have wanted to get their money back. For these reasons, perhaps *inter alia*, they had the articles of incorporation of Puro provide for the redemption of the Class B preferred stock upon order of the board of directors.

The stock of the Chicago company was obtained and the business was operated profitably. No dividends were paid on the Puro common stock until 1936, but, beginning in 1932, approximately one-tenth of the preferred stock of the company was redeemed each half year, so that by the end of 1936, eight of these redemptions had occurred and most of the preferred stockholders had been paid four-fifths of the amounts originally paid for their stock. Yet on January 1, 1936, Puro had undivided profits of $353,013.17, or considerably more than the amount originally paid for the Class B preferred and the common stock.

The plaintiff was required to pay income taxes upon the payments made to her upon the redemption of her preferred stock, upon the basis that these payments were, for tax purposes, the equivalent of dividends, and were not returns of capital. For the taxes so paid by the plaintiff on the $12,033.24 of redemption money she received in 1936, she brings this suit.

Section 115 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, says:

> (a) DEFINITION OF DIVIDEND.—The term "dividend" when used in this title (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable

year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

* * * * *

(c) DISTRIBUTIONS IN LIQUIDATION.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117 (a), 100 per centum of the gain so recognized shall be taken into account in computing net income, except in the case of amounts distributed in complete liquidation of a corporation. For the purpose of the preceding sentence, "complete liquidation" includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all of its stock in accordance with a bona fide plan of liquidation and under which the transfer of the property under the liquidation is to be completed within a time specified in the plan, not exceeding two years from the close of the taxable year during which is made the first of the series of distributions under the plan. In the case of amounts distributed (whether before January 1, 1934, or on or after such date) in partial liquidation (other than a distribution within the provisions of subsection (h) of this section of stock or securities in connection with a reorganization) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits.

* * * * *

(g) REDEMPTION OF STOCK.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * * *

(i) DEFINITION OF PARTIAL LIQUIDATION.—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

Treasury Regulations 94, promulgated under the Revenue Act of 1936, contains the following:

ART. 115–9. DISTRIBUTION IN REDEMPTION OR CANCELLATION OF STOCK TAXABLE AS A DIVIDEND.—* * *.

The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. A bona fide distribution in complete cancellation or redemption of all of the stock of a corporation, or one of a series of bona fide distributions in complete cancellation or redemption of all of the stock of a corporation, is not essentially equivalent to the distribution of a taxable dividend. * * *

The Government says that Section 115 (g), quoted above, is applicable; that the payments to the plaintiff in redemption of her preferred stock were made to her "at such time and in such manner as to make the distribution * * * essentially equivalent to the distribution of a taxable dividend * * *"; and that they were, therefore, properly taxed. We agree. The corporation had large net earnings, and had no thought of liquidating its operating assets, or curtailing its operations. It was distributing a part of its net earnngs or profits. If it had, as it might have, distributed some of those earnings to the holders of its common stock, that distribution would undoubtedly have been a taxable dividend. Instead, it distributed the earnings as the price of the redemption of its preferred stock. To whatever

extent the ownership of the preferred and common stock was, as it was of the time of the original issue, in the same persons, share for share, the distribution went to the same persons in the same amounts as it would have gone if it had been distributed as a dividend on the common stock. The shares, the redemption money for which was taxed to the plaintiff, were shares originally issued to her. The record does not show whether she still had the common shares similarly acquired, though it does show that she still had common shares. If there had been a change in the facts in this regard, and if it is material whether there was such a change, the plaintiff could and should have proved the facts as they were in 1936.

One of the reasons for the provision in Puro's articles of incorporation for redemption of the preferred stock was the thought of the original investors that, while the business might be profitable for a time, it might be ruined, with a large loss of capital asset value, by the installation by the City of Chicago of a municipal filtration plant. The investors seem, therefore, to have desired to have their capital paid back to them out of current profits, while retaining, in their common shares, the share in the earnings of the company which they had before, less the 6% which the preferred stock paid.

The plaintiff contends that, since the redemption was an honest business transaction, it is not taxable. We think that the question of whether a distribution is "essentially equivalent to the distribution of a taxable dividend" under section 115 (g) does not depend on the presence or absence of honesty in the distribution. The question is, as the statute makes it, a question of equivalence, and if that is present, the statute expressly taxes the distribution.

In *Rheinstrom* v. *Conner*, *Collector of Internal Revenue*, 125 F. (2d) 790, the Circuit Court of Appeals for the Sixth Circuit listed a number of factors which are of assistance in determining equivalence. On the facts before us, as recited in the findings, we think the requisite equivalence was present and the payments were taxable as income.

The plaintiff's petition will be dismissed. It is so ordered.

JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

The inclusion in plaintiff's income of the entire amount received by her for the redemption of her preferred stock in the Puro corporation was proper only if "the distribution and cancellation or redemption in whole or in part [was] essentially equivalent to the distribution of a taxable dividend." The majority opinion holds that it was. I do not think so.

Plaintiff and other holders of the preferred stock paid cash for it. They received their common stock in consideration of the transfer to the corporation of their option to purchase the stock of the Chicago Water Purifying Company. At the time they bought the preferred stock it was agreed that it would be redeemed at the discretion of the Board of Directors. It was redeemed pursuant to this agreement.

In the opinion and in the findings it is said that it was redeemed from earnings and profits. This is a conclusion that I do not think is justified. Whether or not it was redeemed from earnings or profits or with the money which these people originally paid for the stock, it is impossible to say.

Moreover, at the time it was redeemed some of the holders held only the preferred stock. They did not own any common stock, and when their preferred stock was redeemed, their interest in the company ceased. Nor is it true that the preferred stock was redeemed pro rata until after the corporation called it and required all holders of it to permit its redemption. Before this some of the holders of it preferred to keep the stock and declined to allow it to be redeemed.

For the distribution to have been essentially equivalent to the payment of a dividend, the distribution must have been out of earnings and profits, it must have been pro rata, and it must have been to persons who remained stockholders after the redemption. It did not fulfill these requirements and, therefore, I cannot agree that it was proper to include within the plaintiff's income the entire amount she received upon the redemption of her stock.

LITTLETON, *Judge*, concurs in the foregoing opinion.

Opinion of the Court

THE STANDARD STOKER COMPANY, INC., v. THE UNITED STATES

[No. 46365. Decided October 1, 1945]

On Defendant's Demurrer

Capital stock tax; adjusted value; liquidation of subsidiary.—Although all the assets of the subsidiary had been distributed to the parent corporation on liquidation, capital stock tax was assessable against the subsidiary if there remained a balance after deducting from the declared value of the capital stock the market value of the assets distributed.

Same; determination of "value" of property distributed in liquidation.—The "value" of property distributed in liquidation means the actual value of that property, ordinarily to be determined by fair market value and not on the basis of original declared value of the stock. See *National Steel Corporation* v. *United States*, 133 Fed. (2d) 256; *First National Pictures, Inc.*, v. *United States*, 91 C. Cls. 83.

Same; corporation liable for tax in year in which it did business.—The capital stock tax is levied with respect to carrying on or doing business, and where the corporation did business within the taxable year it is subject to the tax, the amount to be determined in the manner prescribed by the statute.

Same; no cause of action stated in petition.—Where the plaintiff does not allege that the determination by the Commissioner of Internal Revenue of the fair market value of the property distributed in liquidation was erroneous; it is *held* that plaintiff's petition does not state a cause of action.

Mr. Jesse B. Robinson for the plaintiff. *Messrs. Robert E. Coulson, James K. Polk*, and *Whitman, Ransom, Coulson & Goetz* were on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on demurrer.

Plaintiff alleges that on and prior to January 1, 1936, and until November 30, 1936, it was the owner of all of the capital stock of a corporation of the same name as its own. On

November 30, 1936, the former corporation completely liquidated, transferring all of its assets to plaintiff, who assumed its liabilities, and completely cancelling its capital stock. The former corporation will hereafter be referred to as the "liquidated corporation."

On July 29, 1937, the liquidated corporation filed a capital stock tax return which showed no capital stock tax due. Subsequently the Commissioner of Internal Revenue assessed against plaintiff, as transferee, a capital stock tax of $4,301.00, plus interest in the amount of $365.28. This was duly paid and claim for refund therefor was filed.

Plaintiff's liability for any part of the tax is the issue presented. Its liability depends upon the proper construction of section 105 of the Revenue Act of 1935, c. 829, 49 Stat. 1014, 1017–1018, which provides in part:

> (a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock.
>
> * * * * *
>
> (f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section * * *. For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid in surplus and contributions to capital, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by Title I of the Revenue Act of 1934, as amended, over the amount disallowed as a deduction by section 24 (a) (5) of such title, and (5) the amount of the dividend deduction allowable for income tax purposes, and minus (A) *the value of property distributed in liquidation to shareholders*, (B) distributions of earnings or profits, and (C) the excess of the deductions allowable for income tax purposes over its gross income * * *. [Italics ours.]

Plaintiff's position is that, since the liquidated corporation distributed all of its assets within the taxable year for which the tax was levied, of necessity the adjusted declared value of its stock is zero.

The capital stock tax and the excess profits tax are related taxes. The capital stock tax is based upon the declared value of plaintiff's capital stock. This declared value is one of the bases for the assessment of the excess profits tax. Under the Act a taxpayer was permitted to declare any value it pleased for its capital stock, since the lower the value declared, the greater would be the excess profits taxes, which would offset the saving in capital stock tax; on the other hand, the higher the declared value of the capital stock, the greater would be the capital stock tax, but this would be offset by a decrease in the amount of the excess profits tax. A taxpayer had the election to declare any value it pleased, but this value could not be changed. *Chicago Telephone Supply Co.* v. *United States*, 92 C. Cls. 167 (35 F. Supp. 470).

Thereafter, the value of its stock for subsequent years, referred to in the Act as "the adjusted declared value," was to be ascertained by the addition to the original declared value of certain things which increased that value, and by the deduction of certain things which decreased that value. The things to be added and the things to be deducted were set out in detail. Among the deductions was "the value of property distributed in liquidation to shareholders."

As has been held by this court and by the Third Circuit Court of Appeals, the "value" of property distributed in liquidation means the actual value of that property, ordinarily to be determined by fair market value. *National Steel Corporation* v. *United States*, 133 F. (2d) 256; *First National Pictures, Inc.*, v. *United States*, 91 C. Cls. 83 (32 F. Supp. 138).

It is impossible to conclude from a reading of the Act that Congress had in mind the deduction of a value of the property distributed based upon the original declared value of the capital stock. The Act provides for the addition to the original declared value of "the cash and *fair market value* of property paid in for stock or shares" (italics ours); secondly, it provides for the addition of "paid in surplus and

contributions to capital"; thirdly, of "its net income." Clearly, in determining the value of the paid in surplus and contributions to capital, as well as the value of property paid in for stock or shares, Congress had in mind the fair market value. It could not have had in mind a value determined by reference to the original declared value of the capital stock. This is also true, necessarily, of the computation of its "net income." Likewise, Congress must have had in mind when it provided for the deduction of the value of the property "distributed in liquidation to shareholders" the same basis of valuation it had in mind when it spoke of "the cash and fair market value of property paid in for stock or shares," and when it spoke of "paid in surplus and contributions to capital," and of "its net income."

The fallacy in plaintiff's argument lies in the fact that the original declared value had no necessary relation to the actual value of its capital stock. Had it been necessary for the liquidated corporation to ascertain and declare the actual value of its capital stock, then, in the absence of error, the adjusted declared value should have been zero after the corporation had completely liquidated; but this result does not necessarily follow where the taxpayer is permitted to place on its capital stock in the beginning a value that is purely fictitious.

The valuation of the assets transferred on liquidation on the basis of their declared value, instead of their actual value, would be tantamount to changing the original declared value of the capital stock, and this is prohibited by the Act, as we have seen. At the time of the original declaration the assets behind the capital stock were given an inflated value by the liquidated corporation. Only by a deflation of this value can we arrive at zero by deducting the value of the assets transferred on liquidation.

The capital stock tax is levied with respect to carrying on or doing business. The liquidated corporation did business within the taxable year and, therefore, is liable to a tax. The amount of the tax is to be determined in the way laid down by the statute. The only deduction to which plaintiff is entitled for the amount of the property distributed in liquidation is that deduction provided for in the statute, which is

"the value of the property" so distributed; and we are of opinion that the value referred to is the market value.

Plaintiff does not allege that the determination of the Commissioner of Internal Revenue of the fair market value of that property was erroneous. In the absence of such an allegation, it is clear that plaintiff's petition does not state a cause of action. This holding is in accord with the authorities cited.

It results that the demurrer must be sustained and plaintiff's petition must be dismissed. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

ANTHONY P. MILLER AND ANTHONY P. MILLER, INCORPORATED, *v.* THE UNITED STATES

[No. 45821. Decided October 1, 1945]

On the Proofs

Government contract; lowest bid not amended by telegram not received before opening of bids which telegram was later cancelled.—Where plaintiffs, contractors, in response to an invitation from the National Housing Agency for bids for the construction of a Government housing project, submitted a bid for $693,000.00, plus costs of bonds; and where said bid was received by the Authority prior to 2 p. m. on October 22, 1942, the day and hour named in the invitation; and where plaintiffs on the same day before 2 p. m. filed with the telegraph company a telegram to the Authority reducing their bid by $50,000.00; and where the telegram was not received by the Authority before the opening of bids, at which time the bid of plaintiffs for $693,000.00 was found to be the lowest bid; and where, upon learning that their bid was lowest and before their telegram had been received by the Authority, plaintiffs on the same day dispatched a second telegram to the Authority requesting that the previous telegram be disregarded "as same was not received prior to the hour set for opening of bids as required by specifications;" and where, meanwhile, by oral message plaintiffs had informed the Authority, before the receipt of either telegram, that the earlier telegram was to be disregarded; it is *held* that plaintiffs did not make an effective offer to reduce their bid and that the

amount of plaintiffs' bid was $693,000.00. *Aleck Leitman* v. *United States*, 104 C. Cls. 324, distinguished.

Same; an offer not communicated is not effective.—An offer is not made until it is communicated to the offeree, and until it is made it may be withdrawn, or obliterated, by a communication expressing an intent to do so.

Same.—If the willingness to contract on the basis of words previously dispatched no longer exists, and if the absence of that willingness has been brought home to the person to whom the words were dispatched, the words, when they later arrive, are empty of the substance necessary to the meeting of the minds of parties in a contract.

Same; intent of parties as shown by the evidence.—On the evidence adduced as to the intent of the parties, it is found that the parties were in disagreement as to what amount the plaintiffs had effectively bid; that neither party was willing to make an unqualified contract for the amount which the other contended to be the amount of the bid; that they reached an agreement to qualify the language of the contract so that it would permit the plaintiffs to establish the bid price, which would thus be the contract price, by litigation in which the disputed facts relating to the telegrams could be resolved, and the correct rules of law applied to them.

Same; amount of contract price.—Where plaintiffs on November 12, 1942, signed a contract naming the contract price as $643,000.00 but containing a proviso permitting the plaintiffs to establish by litigation whether the effective bid was for $693,000.00 or $643,000.00; it is *held* that since it is established that the only bid was for $693,000.00, plaintiffs are entitled to recover $50,000.00.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Messrs. King & King*, *Thomas H. Munyan* and *Harry D. Ruddiman* were on the briefs.

Messrs. Philip Mechem and *Newell A. Clapp*, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Horace G. Marshall* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, Anthony P. Miller, is a resident of Pleasantville, New Jersey, and plaintiff, Anthony P. Miller, Incorporated, is a New Jersey corporation with its principal place of business in Atlantic City. Both plaintiffs are now and

were at all times hereinafter mentioned engaged in the general contracting business. Plaintiff, Anthony P. Miller, owns 60 percent of the stock of plaintiff, Anthony P. Miller, Incorporated, the balance being owned by his wife and children. He is and was president of that corporation and manages and controls it.

2. October 10, 1942, the National Housing Agency, Federal Public Housing Authority, hereinafter sometimes referred to as the "Authority," issued an invitation for bids for the construction of a housing project near Hatboro, Pennsylvania, which read as follows:

> SEALED BIDS, in triplicate, subject to the conditions contained herein, and the Contract Documents, will be received until 2 P. M. o'clock on October 22, 1942, and then publicly opened at the Federal Public Housing Authority, 270 Broadway, New York City, for furnishing all labor and materials and performing all work for the construction of War Housing Project PA36258, Upper Moreland Township near Hatboro, Montgomery County, Pennsylvania.
>
> Attention is called to the fact that the minimum wage rates as set forth in the Contract Documents must be paid on this project. Forms of contract documents, including specifications and drawings are on file at the office of Silverman and Levy, Architects Building, 17th and Sansom Streets, Philadelphia, Pennsylvania, and may be obtained by the deposit of $50.00 for each set to assure its return in good condition within 10 days after opening of bids. The right is reserved, as the interest of the Government may require, to reject any and all bids and to waive any informality in bids received.
>
> Receipt of this notice of bids by any contractor shall not be construed as an admission by the Government of such contractor's qualifications to perform the work contemplated by the bids.
>
> Bid security in the form of a money order, certified check, or cashier's check made payable to the Treasurer of the United States, or a satisfactory bid bond on U. S. Standard Form No. 24, in an amount not less than two percent (2%) of the bid will be required.
>
> Attention is also called to the fact that the cost of performance and Payment Bonds shall not be included in the lump sum bid.

3. Included in the instructions to bidders as a part of the contract documents were the following provisions:

8. BID AND PERFORMANCE GUARANTEES

* * * * *

(4) *Bids in excess of $2,000* shall be accompanied by a bid guarantee of not less than two per cent (2%) of the amount of the bid, which may be: Bid Bond on U. S. Standard Form No. 24, Money Order, Certified Check or Cashier's Check, made payable to the Treasurer of the United States. Such money order or check shall be submitted with the understanding that it shall guarantee that the bidder will not withdraw his bid within thirty days after the date of the opening of the bids; that if his bid is accepted he will enter into a formal contract with the Government, and give bonds as may be required; and that in the event of the withdrawal of said bid within said period, or the failure to enter into said contract and give said bonds within the time specified, the bidder shall be liable to the Government for the difference between the amount specified in his bid and the amount for which the Government may otherwise procure the required work, if the latter amount be in excess of the former, and the Government shall have the right to retain the proceeds of said money order or check to apply on account of such excess cost. Money orders and checks of unsuccessful bidders will be returned when award is made; that of the successful bidder will be returned when formal contract and bonds are approved.

* * * * *

9. TIME FOR RECEIVING BIDS

(1) Bids received prior to the time of opening will be securely kept, unopened. The officer whose duty it is to open them will decide when the specified time has arrived, and no bid received thereafter will be considered; except that when a bid arrives by mail after the time fixed for opening, but before the award is made, and it is shown to the satisfaction of the officer authorized to make the award that the nonarrival on time was due solely to delay in the mails for which the bidder was not responsible, such bid will be received and considered. No responsibility will attach to an officer for the premature opening of a bid not properly addressed and identified. Unless specifically authorized, telegraphic bids will not be considered, but modifications by telegraph of bids already submitted will be considered if received prior to the hour set for opening: *Provided*,

That such modifications are confirmed in writing over the signature of the bidder within 48 hours thereafter; *Provided further*, That the Government may, in its discretion, waive failure of the bidder to so confirm such modifications.

(2) Bidders are cautioned that, while telegraphic modifications of bids may be received as provided above, such modification, if not explicit and if in any sense subject to misinterpretation, shall make the bid so modified or amended subject to rejection.

(3) Bidders are cautioned to allow ample time for transmittal of bids by mail or otherwise. Bidders should secure correct information relative to the probable time of arrival and distribution of mail at the place where bids are to be opened; and, so far as practicable, make due allowance for possible delays in receipt of bids.

10. WITHDRAWAL OF BIDS

Bids may be withdrawn on written or telegraphic request dispatched by the bidder in time for delivery in the normal course of business prior to the time fixed for opening; *Provided*, That telegraphic withdrawal is confirmed in writing over the signature of the bidder within 48 hours thereafter. Negligence on the part of the bidder in preparing the bid confers no rights for the withdrawal of the bid after it has been opened.

11. BIDDERS PRESENT

At the time fixed for the opening of bids, their contents will be made public for the information of bidders and others properly interested who may be present either in person or by representative.

12. AWARD OF CONTRACT—REJECTION OF BIDS

The contract will be awarded to the lowest responsible bidder complying with the conditions of the invitation for bids, provided his bid is reasonable and it is to the interest of the Government to accept it.

4. Pursuant to the instructions set out above, plaintiffs, on October 21, 1942, mailed to the Federal Public Housing Authority, 270 Broadway, New York, N. Y., their bid in the sum of $693,000, plus $7,500 in addition for the cost of the bond should the Authority desire it. The Authority received that bid at or prior to 2 p. m. on October 22, 1942. The bid contained the following provision:

If written notice of the acceptance of this bid is mailed, telegraphed or delivered to the undersigned

within thirty days after the date of opening of the bids, or at any time thereafter before this bid is withdrawn, the undersigned agrees that he will execute and deliver a contract in the form attached to the Instructions to Bidders (U. S. Standard Form No. 23, Revised) as required by the Contract Documents, in accordance with the bids as accepted, and that he will, if required, by the Government, give performance and payment bonds as specified, with good and sufficient surety or sureties, all within five days (unless a longer period is allowed) after the prescribed forms are presented to him for signature.

With the bid, and referred to therein, was forwarded the bid bond on a standard Government form in the amount of $15,000, executed by plaintiffs, as principals, and by the Seaboard Surety Company of New York, as surety. The bond contained the following provision:

> Now, Therefore, if the principal shall not withdraw said bid within the period specified therein after the opening of the same, or, if no period be specified, within sixty (60) days after said opening, and shall within the period specified therefor, or, if no period be specified, within ten (10) days after the prescribed forms are presented to him for signature, enter into a written contract with the Government, in accordance with the bid as accepted, and give bond with good and sufficient surety or sureties, as may be required, for the faithful performance and proper fulfillment of such contract, or in the event of the withdrawal of said bid within the period specified, or the failure to enter into such contract and give such bond within the time specified, if the principal shall pay the Government the difference between the amount specified in said bid and the amount for which the Government may procure the required work and/or supplies, if the latter amount be in excess of the former, then the above obligation shall be void and of no effect, otherwise to remain in full force and virtue.

5. In accordance with provisions contained in invitations for bids, plaintiffs had usually on prior similar occasions submitted telegraphic modifications of their bids. When the bid involved in this case was submitted, plaintiffs had anticipated that such a modification might be made on account of the receipt of delayed proposals from subcontractors which

might make necessary either an increase or decrease in their submitted bid. In this instance proposals were received from subcontractors after plaintiffs' written bid was mailed and as a result plaintiffs at or about 12:43 p. m. on October 22, 1942, delivered to the Western Union Telegraph Office in Atlantic City, New Jersey, for transmission to New York City, the following telegram:

> RXMHA125 31/28=ATLANTIC CITY NJ 22 12 32P
> NATIONAL HOUSING AGENCY=
> DLR BEFORE 1 45 PM FEDERAL PUBLIC HOUSING AUTHORITY ROOM 2811 270 BROADWAY NYK=
> =REDUCE THE BASIC BID PRICE OF OUR BID ON THE CONSTRUCTION OF WAR HOUSING PROJECTS PA36258, DATED OCTOBER 22ND 1942 BY THE AMOUNT OF $50,000.00 (FIFTY THOUSAND DOLLARS) =
> ANTHONY P MILLER AND ANTHONY P MILLER INC.

A telegram sent from Atlantic City, New Jersey, at 12:43 p. m. would normally reach the addressee in New York City before 2 p. m. on the same day, and this telegram was sent by plaintiffs with the expectation that it would be delivered by that time. However, when it was delivered to the Western Union Office in Atlantic City that office, in accordance with the custom at that time, refused to guarantee the time of delivery.

6. The telegram referred to in the preceding finding was received at the main office in New York City of the Western Union Telegraph Company at 12:49 p. m. on October 22, and was by that office forwarded to its branch office at 306 Broadway, where it was received at 1:07 p. m. Due to a shortage of messengers, the telegram was not sent from the branch office until 2 p. m., at which time it was sent, together with nine other telegrams, all of them for delivery by the same messenger boy within three blocks of the branch office. As will hereinafter appear, that telegram was not received by the Housing Authority until after the opening of the bids.

7. C. O. Skinner of the Housing Authority was in charge of the opening of bids which took place in the conference room on the fourteenth floor of the offices of the Authority at 270 Broadway, New York City. The bids, five in all, were opened promptly at 2 p. m. on October 22, 1942, and

the amounts read aloud by Mr. Skinner. The time spent in the opening and reading of the bids was between five and ten minutes. Plaintiffs' bid in the amount of $693,000, with an additional $7,500 if bond was required, was the lowest bid and the next bid was some $4,000 higher. No telegrams modifying the bids of any bidders were read. In accordance with the practice of the Authority, although the bids were read aloud, no formal statement was made as to which was the low bid and no award was made at that time.

After the bids had been read, a representative of the Authority inquired whether a representative of plaintiffs was present and Howard Hager, a bonding agent, came forward. Hager had attended the opening of bids at the request of plaintiffs but had no authority from plaintiffs to take any action in regard to plaintiffs' bid other than to report what occurred at the opening, and he advised one of the Authority's representatives of his lack of authority to speak for plaintiffs. At that time one of the Authority's representatives discussed with Hager the preparation of a breakdown of plaintiffs' bid on the basis of the amount of $693,000 which had been read at the opening and later plaintiffs submitted a breakdown on that basis.

8. About 2:15 p. m. Hager telephoned from a public telephone in the building where the bids had been opened, to plaintiff Anthony P. Miller in Atlantic City advising him that plaintiffs' bid in the amount of $693,000 as read at the opening was the low bid. Miller asked Hager whether the telegram referred to in finding 5 had been read at the opening and, upon being told that it had not, Miller instructed Hager to make inquiry as to whether the telegram had been received. Up to that time Hager had no knowledge that plaintiffs had sent such a telegram. Upon returning to the room where the bids had been opened and being told by Skinner that no telegram had been received so far as he knew, Hager then telephoned that information to Miller in Atlantic City, and Miller instructed Hager to tell the representatives of the Authority to disregard the telegram when they did receive it as it had been sent in error.

9. When Hager returned from his second conversation with Miller, an air raid drill, which began at 2:30 and con-

tinued until 2:40, was in progress. During the drill the employees of the Authority assembled in the corridors of the building on the floors outside their respective offices. Immediately after the drill ended, Hager met Skinner in the corridor on the fourteenth floor and advised Skinner that plaintiffs had instructed him to advise the Authority of their withdrawal of their telegram modifying their bid and that the Authority was to ignore it. That conversation was concluded by about 2:45 p. m. At that time the telegram modifying the bid and referred to in finding 5 had not been received by the Authority.

10. After Skinner had returned to his office on the twenty-eighth floor, his secretary informed him shortly after three o'clock that she had received a telephone call from another office to the effect that the telegram in question had been received. The telegram was sent immediately by special messenger to Skinner's office and had stamped thereon the time of receipt as 3 p. m., or two or three minutes thereafter. That stamp was placed thereon upon its receipt in the receiving room, or within five minutes after such receipt, and prior to its delivery to Skinner.

11. At 4:27 p. m. on October 22, 1942, plaintiffs sent the following telegram to the Housing Authority which was not received by the Authority until about 10 a. m. on October 23, 1942:

> REQUEST YOU DISREGARD OUR PREVIOUS TELEGRAM OF TODAY CONCERNING WAR HOUSING PROJECT PA 36258 AS SAME WAS NOT RECEIVED PRIOR TO HOUR SET FOR OPENING OF BIDS AS REQUIRED BY SPECIFICATIONS.

Plaintiffs sent no written confirmation of the above telegram.

12. November 6, 1942, the Authority wrote plaintiffs as follows:

> Reference is made to your bid submitted on October 22, 1942, as amended by your telegram of the same date for the construction of War Housing Project Pa-36258, Upper Moreland Township, near Hatboro, Pa.
>
> This is written Notice of Acceptance of your lump sum bid submitted on that date in the amount of $693,-000, modified by your telegram of the same date for a reduction of $50,000, making a net amount of $643,000.

To this amount will be added the actual cost of furnishing Performance and Payment Bonds, which cost shall not exceed $7,500, as indicated in your bid. The net amount of award, therefore, shall not exceed $650,500.

The contract is now being prepared in this office and you will be notified as soon as possible when it is ready for signature. In the meantime, you are requested to obtain promptly four signed and four conformed copies of the necessary Performance and Payment Bonds.

13. At the time of the events hereinabove referred to, Raymond J. Roth was regional counsel for the Housing Authority and Thomas A. Burns was principal attorney for that organization. One of the duties of Burns was to review legal work which passed through his office before consideration by Roth. Before writing the letter of November 6, 1942, referred to in finding 12, Roth and Burns had made an investigation as to the delivery of the two telegrams which had been sent by plaintiff on October 22, 1942. In considering the effect to be given to these telegrams it was Burns' opinion that the telegraph company was the agent of the Government and that accordingly the first telegram should be considered as having been received by the Housing Authority at the time it was delivered to the telegraph company in Atlantic City at 12:43 p. m. on October 22, 1942, and that there had been no effective revocation of that telegram. On that basis Burns approved a memorandum opinion on October 29, 1942, for Roth's signature with respect to the bid to be used in the preparation of the contract. Roth signed that memorandum which contained the following paragraph:

I have caused an examination to be made of the material outlined above, and it is my opinion that the same is legally unobjectionable and that the bid submitted by Anthony P. Miller and Anthony P. Miller, Inc., is acceptable. This latter bid, you will no doubt recall, was originally submitted in the amount of $693,000, and thereafter a telegram authorized a deduction of $50,000. Under the circumstances, the telegraphic modification operated effectively to reduce the original "Miller" proposal so that it represented an offer to construct the proposed improvements for the sum of $643,000.

14. Upon receipt of the above opinion, John K. Leonard, the employee in the Housing Authority charged with the

preparation of contracts, prepared a form of contract in accordance with that opinion which showed the contract price as $643,000, and notified Miller by telephone to come to New York on November 12, 1942, for the purpose of signing the contract.

15. Pursuant to that notification, Miller and certain employees of plaintiffs' organization came to New York on the morning of November 12, 1942. Among those accompanying Miller was Thomas M. Munyan, plaintiffs' attorney. Upon being shown the contract with the contract price appearing therein as $643,000, Miller made known his dissatisfaction with that contract price. Munyan conferred with Roth and Burns in regard to the contract price and in that conference Munyan urged that the telegram reducing the original bid had been revoked prior to its delivery to the Housing Authority and that therefore the only bid of plaintiffs which was before the Housing Authority was the original bid of $693,000. At the time of this conference, the Government was desirous of getting the work started which was covered by the contract. The only item in controversy at that conference was whether the contract price should be $643,000 or $693,000, the defendant's representatives insisting upon the former and plaintiffs' representatives upon the latter. In order to give plaintiffs an opportunity to establish, if it was legally possible, that the correct contract price, based upon the amount of plaintiffs' effective bid, was $693,000, without being prejudiced by having signed the contract showing the contract price as $643,000, the suggestion was made that a paragraph be prepared and inserted in the contract which would save plaintiffs' rights in that respect. In the discussion of the proposed reservation Roth contemplated the possibility of setting up a $50,000 contingent fund to cover the outcome of the controversy which involved that difference in the two amounts and therefore suggested that in order to avoid accounting difficulties the parties should include in the reservation a provision requiring that plaintiffs assert their right within ninety days. Where and how plaintiffs would assert their right was not discussed. Roth instructed Burns to collaborate with Munyan in the preparation of the reservation provision.

16. Munyan and Burns thereupon left Roth's office and thereafter collaborated in the preparation of the reservation provision which is set out in finding 17 and which was incorporated in the contract. After they completed it, Munyan explained his understanding of it to Miller in the presence of Burns as being in substance that in the event it could be shown that the first telegram sent by Miller was revoked prior to its receipt by the Housing Authority the contract price would be $693,000, but that in the event there was no effective revocation the contract price would be $643,000. Miller then indicated that the provision as drafted was satisfactory to him. Burns was satisfied that the provision was not harmful to the defendant's interests but made no comment as to its effect. Munyan and Burns took the reservation provision to Roth who approved it. Shortly thereafter it was delivered to Leonard who had it incorporated in the contract. Miller thereupon on the same day signed the contract which contained the reservation provision.

17. In the contract, plaintiffs for a consideration of $643,000, plus the cost of bonds, not to exceed $7,500, agreed to furnish the materials and perform the work of constructing the Housing Project involved in their bid in accordance with the Government's specifications and drawings. The language of the reservation was as follows:

> Notwithstanding anything to the contrary herein, it is mutually understood and agreed by and between the parties hereto that neither the execution of this Contract nor any action taken thereunder, nor the recital of the contract sum herein, shall constitute or be construed as a waiver by the contractors of any right which the said contractors might have to establish, by such lawful process as the said contractors shall deem expedient, the true contract price to be the sum of $693,000, being the amount of the written bid submitted plus the cost of the Performance and Payment Bonds as hereinbefore stated. The government grants the aforesaid right of action to the contractors and shall not interpose the defense of waiver or estoppel.
>
> It is further mutually understood and agreed by and between the parties hereto, however, that any action taken by the contractors for the purpose aforesaid must be instituted within ninety days from the date hereof.

The work under the contract was duly commenced by plaintiffs and is now completed. This suit was filed February 6, 1943.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

On October 10, 1942, the National Housing Agency, Federal Public Housing Authority, hereinafter for brevity referred to as the Authority, invited bids for the construction of a war housing project at Hatboro, Pennsylvania. The invitation stated that bids would be opened at the Authority's office at 270 Broadway at 2 P. M. on October 22. On October 21, the plaintiffs mailed a letter from Atlantic City, New Jersey, which was their principal place of business, to the Authority, containing a bid of $693,000. This letter arrived in time for the opening of bids.

The instructions to bidders, which were sent by the Authority to prospective bidders, and pertinent parts of which are quoted in finding 3, contained in section 9 (1) a provision that telegraphic modifications of bids already submitted in writing would be considered if received by the Authority prior to the hour set for the opening of bids. This provision, which was usual in invitations, was often made use of by bidders, including the plaintiffs, when bidding for Government contracts. It enabled them to set their final bids on the basis of late offers received by them from prospective subcontractors, and of late information concerning prices. The plaintiffs, having received late offers from subcontractors justifying a reduction of their mailed bid, sent a telegram at 12:43 P. M. on October 22 reducing their bid by $50,000. The plaintiffs very strongly desired that this telegram should reach the Authority before 2 P. M., and sought to have the telegraph company guarantee that it would do so. The company would not so guarantee, and in fact the telegram was not delivered to the Authority until about 3 P. M.

At 2 P. M. the bids, of which there were five, were opened by a Mr. Skinner in the conference room of the Authority's offices in New York, and the amounts of the bids were read aloud to those present. The plaintiffs' bid of $693,000 was lowest, the next one being $4,000 higher. A Mr. Hager of

Philadelphia, who was in the insurance and surety bond business, had been requested by the plaintiffs to attend the opening to observe and report what happened. After the bids had been read, Hager went downstairs to a public telephone and called the plaintiffs and advised them that their bid of $693,000 was the low bid. He was asked by the plaintiffs to find out whether their telegram modifying their bid had been received. He returned to the room where the bids had been opened, and was told by Skinner that he had not heard of any such telegram. Hager then returned to the public telephone and reported to the plaintiffs what he had learned. He was told to go back and tell Skinner to disregard the telegram when it arrived, as it had been sent "in error."

While Hager was downstairs on this errand an air raid alert had been called at 2:30, and the employees in the various offices of the building were required to assemble in the halls outside their offices. The elevators were not running and Hager climbed the stairs to the fourteenth floor where, when the alert was over at 2:40, and when Hager had recovered his breath, he told Skinner, in substance, that the plaintiffs wished their telegram to be disregarded when received, as it had been sent by mistake. This conversation was concluded by about 2:45 P. M. Skinner then returned to his office on the twenty-eighth floor of the building. Shortly after 3 o'clock his secretary told him that she had received a telephone call advising her that a telegram relating to the plaintiffs' bid had come to the Authority. Skinner asked that the telegram be sent to him immediately by special messenger, which was done. This was the telegram reducing the plaintiff's bid by $50,000. The receiving room stamp on it showed the time of receipt as two or three minutes after 3 P. M., and it had been delivered to the Authority, at the receiving room, not more than ten minutes before that time.

The plaintiffs, at 4:27 P. M. on the same day, sent another telegram, which is quoted in finding 11, requesting the authority to disregard the telegram modifying the written bid. This telegram was not received by the Authority until the next day.

On November 6 the Authority wrote the plaintiffs that it had accepted their bid of $693,000, as reduced by their telegram, and that a contract setting the price at $643,000 was being prepared for the plaintiffs' signature. On November 12 the plaintiffs and the Authority signed such a contract, but, pursuant to discussion, inserted in it the following statement:

> Notwithstanding anything to the contrary herein, it is mutually understood and agreed by and between the parties hereto that neither the execution of this Contract nor any action taken thereunder, nor the recital of the contract sum herein, shall constitute or be construed as a waiver by the contractors of any right which the said contractors might have to establish, by such lawful process as the said contractors shall deem expedient, the true contract price to be the sum of $693,000 being the amount of the written bid submitted plus the cost of the Performance and Payment Bonds as hereinbefore stated. The government grants the aforesaid right of action to the contractors and shall not interpose the defense of waiver or estoppel.
>
> It is further mutually understood and agreed by and between the parties hereto however that any action taken by the contractors for the purpose aforesaid must be instituted within ninety days from the date hereof.

The construction called for by the contract has been completed. The plaintiffs are suing for the $50,000 involved in the telegram, the history of which is recited above. The plaintiffs assert that, since their telegram reducing their bid had not been received by the Authority by two o'clock, the hour set for opening bids, and since section 9 (1) of the instructions to bidders, quoted in finding 3 said "Unless specifically authorized, telegraphic bids will not be considered, but modifications by telegraph of bids already submitted will be considered if received prior to the hour set for opening:", the Authority had no right to consider their telegraphic modification, just as they would have had no right to have it considered, if their original bid had not been the low bid. The Government urges that the quoted provision was inserted for the benefit of the Government; that it could, at its option, either insist upon it or waive it; and that since the plaintiffs' bid in writing was already low, and

hence no other bidder could complain, there was no reason why the Government could not accept a still lower, though belated, offer from the already low bidder. A comparable problem was involved in the *Leitman* case, No. 45498, decided May 7, 1945 (104 C. Cls. 324), and we said that, where the late telegram came from a bidder who was already low, the reason for the placing of the time limit on modifications did not apply. But in view of the facts which we have found, and the applicable law as we see it, it is not necessary to further consider that question in this case.

We think that the plaintiffs did not make an effective offer to reduce their written bid. They dispatched a telegram intended to make such an offer, but when they learned that the telegram had been delayed and that their written bid of $693,000 was low, they formed the intention to withdraw the offer contained in the telegram, and communicated that intention to the intended offeree, the Authority, before their offer reached it. An offer is not made until it is communicated to the offeree, and until it is made it may be withdrawn, or obliterated, by a communication expressing an intent to do so. If the willingness to contract on the basis of words previously dispatched no longer exists, and if the absence of that willingness has been brought home to the person to whom the words were dispatched, the words, when they later arrive, are empty of the substance necessary to the meeting of the minds of parties in a contract. We have found that the plaintiffs' oral message, withdrawing the offer to reduce their bid, was delivered through Hager to Skinner before the telegram was delivered to the Authority. There was, therefore, no offer to reduce the bid, made either on time or late, which the Authority could accept, either under the particular procedures by which Government contracts are made, or under ordinary contract law.

The Government contends that the provisions of the paragraph next to the last, quoted in finding 2, and of section 8 (4) of the instructions to bidders, quoted in finding 3, requiring the submission by a bidder with his bid of a bid bond, made the plaintiffs' written bid and its telegraphic modification irrevocable for thirty days, like an offer made for a consideration, or an offer under seal at common law.

The plaintiffs contend that their bid was only an offer, and was therefore revocable by them without any penalty except the forfeiture of their bid bond, at any time before acceptance, which here did not take place until some fifteen days after the opening of the bids and the events relating to the telegram.

Again we do not find it necessary to resolve these contentions. The facts here do not involve the revocation of an offer, but the making or, as we have found, the non-making of a contemplated offer to do the work for $50,000 less than the sum specified in an offer formerly made. Since the contemplated offer was not made, the question of the revocability of such an offer, if it had been made, will not be considered. It is true that when the plaintiffs sent the telegram reducing their written bid, they intended to modify, or *pro tanto* revoke, their previously made offer. But before that offer was communicated, they had changed their minds and again were willing to stand by their original offer. The Authority never having been advised of any desire on the part of the plaintiffs to revoke their $693,000 offer, indeed, having been affirmatively advised that the plaintiffs adhered to that offer, had the right to accept it within the thirty-day period named in the instructions to bidders, and thereby make a binding contract for that amount. The problems that arise here are, therefore, not problems of the revocability of offers.

As we have said, the parties signed a contract on November 12, 1942, naming the contract price as $643,000, but containing the proviso above quoted. The Government urges that this contract settles the question of price; that whether or not the plaintiff had offered to perform the contract for $643,000, it made a contract to do so, which made all the preceding events irrelevant. It says, and the plaintiffs concede, that the plaintiffs had no right, as a result of their being the low bidder at $693,000 to a contract; that the Government had not promised to award the contract to anyone. The Government further says that, the Authority having learned from the telegram that the plaintiffs were willing to do the work for $50,000 less than $693,000, whether they had effectively offered to do so or not, it would not have

awarded the contract to the plaintiffs or any other bidder at $693,000, but would have re-advertised for new bids, if the plaintiffs had not been willing to make the contract for $643,000. This is speculation. To be sure, the Authority had learned something from the plaintiffs' belated telegram, but it knew that the plaintiffs had learned something from the public opening of the bids of other bidders. What the Government would have done would have, probably, depended on the trend of prices of labor and materials, and the necessity for early completion of the work, which was a war housing project. Re-advertising would have taken time, which might have been regarded as more valuable than the possibility, by no means a certainty, of saving some money.

We consider now what we regard as the essence of the case; the meaning of the special language inserted in the contract because of the problem arising out of the telegram relating to the $50,000. The plaintiffs contend that the contract is, in reality, a promise by the Government to pay either $643,000 for the work, or, if it shall be determined by suit that the Government did not have a bid, which it had a right to accept, for $643,000, but only a bid for $693,000, then to pay $693,000. The Government contends that the inserted language means only that the plaintiffs may bring a suit and that the Government will not interpose the defenses of waiver or estoppel; but that it affects in no way the balance of the contract which is a plain agreement on the part of the plaintiffs to do the work for $643,000.

Of the plaintiffs' asserted interpretation of the special language, one must say that the language is an inept way of saying what the plaintiffs say it means. As to the Government's asserted interpretation, it makes the language quite completely futile and useless, as well as somewhat self-contradictory when read in connection with the rest of the contract. Whether it is called waiver, estoppel, or something else, it comes very close to one of those concepts to be told that one paragraph of their contract, specially written and inserted, gives the plaintiffs no rights because the contract which they have signed contains other contradictory paragraphs. So we have a situation in which the meaning for which the plaintiffs contend is by no means the plain mean-

ing of the words in question, and the meaning for which the Government contends is, in essence, no meaning at all. We must, therefore, either omit the language from our consideration altogether, or search for its meaning in the expressions of the parties at the time they formulated the cryptic language, and the background of events in which they used it.

If the Government agents who made the contract held the same beliefs as the Government lawyers express in their briefs; that the telegram was, or probably was, delivered to the Authority before it was countermanded by the sender; that it therefore constituted a bid, if the Authority chose to waive the fact of its arrival after the other bids had been opened; and that as a bid it was irrevocable for thirty days, according to the Government's interpretation of the instructions to bidders; then it would seem that the agents of the Authority insisted on the $643,000 figure in the contract because they thought the plaintiffs had bid that amount. That fact would have a tendency to show that the agents of the Authority were willing, if they did not have a bid for $643,000, but one for $693,000, to pay $693,000 for the work; that they were somewhat uncertain as to which figure was the plaintiffs' effective bid, and were willing to insert the special language in the contract to permit the plaintiffs to establish, in litigation, which was the effective bid, and to express the thought that the contract price should be whatever amount should be so established. If that was what the parties meant by the special language in the contract, the plaintiffs are entitled to recover, as we have determined that the plaintiffs' only bid was $693,000.

We remanded the case for a hearing of evidence as to the intent of the representatives of the parties when they composed the reservation which was written into the contract, as shown by what they said in their conversations about it. On the basis of that evidence, we have concluded that the parties were in disagreement as to what amount the plaintiffs had effectively bid; that neither party was willing to make an unqualified contract for the amount which the other contended to be the amount of the bid; that they reached an agreement to qualify the language of the contract so that it would permit the plaintiffs to establish the bid price, which

would thus be the contract price, by litigation, in which the disputed facts relating to the telegram could be resolved, and the correct rules of law could be applied to them.

We therefore construe the ambiguous special language in the contract of November 12, 1942, as intended to mean that the price should be $643,000, or $693,000 if that sum should be shown by litigation to be the plaintiffs' bid. We have concluded above that the plaintiffs' bid was $693,000. That was, therefore, the price which the Authority promised to pay for the work. It follows that the plaintiffs may recover $50,000.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge; and* WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

KEITH BREWSTER VAN ZANTE v. THE UNITED STATES

[No. 46378. Decided October 1, 1945. Plaintiff's motion for new trial overruled November 5, 1945]

On Defendant's Demurrer

Pay and allowances; Navy officer dismissed from the service.—Where an officer in the Naval Reserve, released from active duty and then discharged by the Secretary of the Navy, made application in writing and under oath, every 6 months, for a court martial, as provided by articles 36 and 37 of Section 1200, Title 34, U. S. Code, making void such discharge if the court martial is not convened; and where even if his dismissal may have been wrongful; it is *held* that in absence of showing that he had attended regular drill or performed equivalent duty plaintiff's petition does not allege facts sufficient to show that the plaintiff is entitled to recover any sum from the United States as compensation for his services.

Same; authority of Secretary of the Navy.—The Secretary of the Navy had authority under the statute (U. S. Code, Title 34, section 853c) to release an officer in the Naval Reserve and place him in an inactive status.

Same; compensation of officer in U. S. Navy Reserve in inactive status.—An officer in the U. S. Navy Reserve, in an inactive status, is not entitled to any compensation except that provided

for in section 855 (1) of Title 34, U. S. Code, which provides compensation only for attending drills or performing equivalent duty, under proper orders.

Mr. Keith Brewster Van Zante, pro se.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on demurrer. Plaintiff in his petition sues for the sum of $7,539.13, pay to which he claims he is entitled as an officer in the United States Naval Reserve.

He alleges that on September 30, 1942, he was ordered to inactive duty in the Naval Reserve, and that later, on January 21, 1943, he was discharged from the United States Naval Reserve by the Secretary of the Navy. He alleges that he contested the discharge and requested trial by court-martial, and continued to request trial by court-martial as often as once in six months, on the ground that he had been wrongfully discharged.

The statutes pertinent to plaintiff's claim are codified in the United States Code as section 853 (c) and section 1200, articles 36 and 37, all of Title 34 of the Code. Section 853 (c)[1] reads as follows:

> Any member of the Naval Reserve * * * may be ordered to active duty by the Secretary of the Navy in time of war or when in the opinion of the President a national emergency exists and may be required to perform active duty throughout the war or until the national emergency ceases to exist; * * * *Provided*, That the Secretary of the Navy may release any member from active duty either in time of war or in time of peace. * * *

According to plaintiff's petition, he was released from active duty on September 30, 1942, and placed in an inactive status. The above-mentioned section clearly authorizes such action.

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[1] This section is a codification of the Acts of June 25, 1938, c. 690, Title I, sec. 5, 52 Stat. 1176; June 13, 1939, c. 205, sec. 12 (d), 53 Stat. 821; June 24, 1941, c. 233, sec. 2, 55 Stat. 261; August 4, 1942, c. 547, sec. 15 (b), (d), (e), 56 Stat. 739.

It is clear that persons in the Naval Reserve on an inactive status are not entitled to compensation, except that provided for in section 855 (1), Title 34, of the United States Code.

This section provides in part:

> Officers and enlisted men of the Naval Reserve shall receive compensation at the rate of one-thirtieth of the monthly base pay of their grades, ranks, or ratings, not to exceed $10, for attending, under competent orders, each regular drill duly prescribed under the authority of the Secretary of the Navy, including drills performed on Sunday, for the organization to which attached, or for the performance of an equal amount of such other equivalent instruction or duty, or appropriate duties, as may be prescribed by the Secretary of the Navy: *Provided*, * * *.

But plaintiff's petition does not show that he is entitled to the compensation provided for in this section, and this is the only compensation to which a member of the Naval Reserve is entitled.

Plaintiff relies upon the provisions of articles 36 and 37 of section 1200, Title 34, of the United States Code. Article 36 provides for the dismissal of officers in the naval service by order of the President or by sentence of a general court-martial. Article 37 provides in part as follows:

> When any officer dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed. And if such court-martial shall not be convened within six months from the presentation of such application for trial, or if such court, being convened, shall not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void: *Provided*, * * *.

In the proviso a dismissed officer's right to compensation is limited to six months after dismissal, unless he shall at least once every six months continue to demand a trial, in vain. Plaintiff alleges that his dismissal was wrongful and he did continue to demand a trial once every six months. However, even though plaintiff's petition may bring him within the

provisions of articles 36 and 37 of section 1200 of Title 34 of the Code, nevertheless, he has not alleged facts sufficient to show that he is entitled to recover any sum from the United States as compensation for his services, because his petition shows he was on an inactive status in the Naval Reserve Corps, and such an officer is not entitled to any compensation, as stated above, except that provided for in section 855 (1), and plaintiff has not alleged facts sufficient to show that he is entitled to the compensation therein provided for.

It results that defendant's demurrer must be sustained and plaintiff's petition must be dismissed. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

THOMAS EDWARD HAVEY v. THE UNITED STATES

[No. 45993. Decided October 1, 1945]

On the Proofs

Pay and allowances; increased retired pay under the Pay Readjustment Act of 1942.—The Pay Readjustment Act of 1942, 56 Stat. 359, which was a comprehensive overhauling of the entire pay system of all of the armed forces, increased the pay of many classes of persons, especially enlisted men, and provided in Section 15 that retired enlisted men should have their retired pay computed on the basis of the pay provided in the Act, thus automatically giving retired men the same percentages of the increased active duty pay provided in the Act that they had formerly had of the lesser pay formerly provided, although no longer receiving the allowances for enlisted men on the retired list previously provided under the Act of May 2, 1907, 34 Stat. 1217.

Same; retired pay not decreased.—The plaintiff, an enlisted man in the Navy, who after 20 years' service, had gone on the retired list in 1929, is entitled to increased retired pay as provided under the Pay Readjustment Act of 1942, but is not entitled also to the $15.72 per month of retired allowances which under the Act of March 2, 1907, he had been receiving before the 1942 Act took effect, since his compensation, thus computed, is not decreased.

Same; construction of "or" to mean "and."—The construction of courts of the word "or", as used in a statute or legal instrument, to mean "and" is commonplace.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Mr. Robert Burstein, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Mr. Ralph H. Case filed a brief as *amicus curiae.*

The court made special findings of fact as follows:

1. Plaintiff, Thomas Edward Havey, first enlisted in the United States Navy on March 3, 1902, and was discharged April 24, 1906; he reenlisted on September 10, 1908, and was discharged on September 9, 1912; he reenlisted on September 10, 1912, and was discharged on September 9, 1916; he reenlisted on September 11, 1916, and was discharged on June 10, 1920; he reenlisted on July 11, 1920, and served until November 15, 1924, when he was transferred to the Fleet Reserve, Class F 3 D, in the grade of Chief Yeoman (P. A.), and on December 3, 1924, he was released from active duty. At the time of his transfer to the Fleet Reserve he was credited with 20 years, 6 months and 26 days service. On October 10, 1929, he was transferred to the retired list on account of physical disability. He completed 30 years' service, including active Naval Service, time on the Fleet Reserve and time on the retired list on April 19, 1934.

2. Immediately prior to June 1, 1942, plaintiff received $110.05 per month as retired pay and allowances, computed as follows:

Retired pay (one-half of $126 per month, active duty pay of Chief Yeoman, U. S. Navy, as provided by Act of September 16, 1940, 54 Stat. 895)	$63.00
Maximum longevity pay, based upon more than 16 years' service, as provided by Act of September 16, 1940, *supra*, (25% of $126)	31.50
"Retired allowances" in lieu of rations, clothing, quarters, fuel and light, as provided by Act of March 2, 1907, 34 Stat. 1217	15.75
Total retired pay and allowances	110.25

From the total retired pay and allowances due plaintiff there was deducted the sum of $.20 per month for hospital fund, leaving $110.05 as the net amount received by plaintiff as retired pay and allowances.

3. Subsequent to June 1, 1942, plaintiff received the same amount, namely $110.05, as retired pay and allowances, until March 31, 1943.

Since April 1, 1943, he has received the sum of $110.20 per month as retired pay, computed as follows:

Retired pay (one-half of $138, active duty pay of chief yeoman, first grade, as provided by the act of June 16, 1942, 56 Stat. 359)	$69.00
Longevity pay based on more than 18 and less than 21 years' active service (5% for each 3 completed years or 30% of $138)	41.40
Total retired pay	110.40

From the total retired pay due plaintiff there has been deducted the sum of $.20 per month, leaving $110.20 as the net amount of the retired pay received by him each month since April 1, 1943.

4. If plaintiff were entitled to "retired allowances" since June 1, 1942, there would be due him the sum of $204.75, representing such allowances for the period from June 1, 1942, to June 30, 1943, as computed by the General Accounting Office, and additional amounts, not yet computed for the period since June 30, 1943.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff is an enlisted man of the United States Navy who was retired prior to June 1, 1942, the date as of which the provisions of the Pay Readjustment Act of 1942, Act of June 16, 1942, 56 Stat. 359, became applicable. That act was a comprehensive overhauling of the entire pay system of all of the armed forces. It increased the pay of many classes of persons, especially enlisted men. It provided in Section 15 that retired enlisted men should have their retired pay computed on the basis of the pay provided in the act,

thus automatically giving retired men the same percentages of the increased active duty pay provided in the act, that they had formerly had of the lesser pay formerly provided.

Section 1 of the act of March 2, 1907, 34 Stat. 1217, had provided that an enlisted man could, after thirty years of service, retire, if he applied for retirement, and receive as retired pay a stated percentage of the pay he had been receiving, and $15.75 per month as allowances in lieu of rations, quarters, fuel, light and heat. The Pay Readjustment Act of 1942, which, as we have said, increased the retired pay of retired enlisted men said, *inter alia*, in Section 19:

> * * * and those portions of the Act of March 2, 1907 (34 Stat. 1217) and of the Act of June 30, 1941 [1] (Public Law 140, Seventy-seventh Congress) which authorize allowances for enlisted men on the retired list * * * are hereby repealed: * * *.

It is evident, and the plaintiff agrees, that the general effect of the 1942 Act was to discontinue the payment of allowances, as such, to retired enlisted men. It was thought, apparently, that the increases in pay for active service provided in the 1942 Act, would, when the retired pay percentages were applied to them and the more liberal provision for longevity additions to pay were added, produce an adequate total compensation for retired enlisted men. A man who retired after the Act of 1942 took effect, would, therefore receive no separate allowance of $15.75 in addition to the increased retired pay provided in that Act. But the plaintiff contends that he, as an enlisted man who had gone on the retired list in 1929, was and is entitled, not only to the increased retired pay which he has received under the 1942 Act but to the $15.75 per month of retired allowances which he was receiving before the 1942 Act took effect. He bases this contention upon that part of the following quoted first paragraph of Section 19 of the Act of 1942 which precedes the word "Provided":

> SEC. 19. No person, active or retired, of any of the services mentioned in the title of this Act, including the Reserve components thereof and the National Guard,

[1] 55 Stat. 394. This Act, like the 1907 Act, provided for allowances of $15.75 to retired enlisted men.

> shall suffer, by reason of this Act, any reduction in any pay, allowances, or compensation to which he was entitled upon the effective date of this Act: *Provided, however*, That nothing in this Act shall be construed to deprive any enlisted man transferred to the Fleet Reserve on or prior to the date of enactment of this Act, or transferred from the Fleet Reserve to the retired list of the regular Navy for physical disability, of any benefits, including pay, allowances, or compensation, which he would be entitled to receive upon the completion of thirty years under laws in force on the date of enactment of this Act.

The part of the quoted language preceding the proviso makes it plain that the act was not to be allowed to have the effect of decreasing the compensation of any person covered by the act below what he was receiving when the act took effect. Whether it was intended to prevent, distributively, decreases in pay, decreases in allowances, and decreases in any other compensation, even though there was no decrease in the aggregate, is the question upon which the plaintiff's case depends. As the findings show, the plaintiff's increased retired pay and longevity pay under the 1942 Act were slightly more than he had received under the former act as retired pay, longevity pay, and allowances of $15.75 per month, combined.

The plaintiff says that the statute is plain, and should simply be applied as written. We agree that, upon a first reading, it seems to mean what the plaintiff contends. But after a study of the language in its setting, we come to the opposite conclusion. If the plaintiff's reading is followed, there will be discrimination of $15.75, or about 14% in current compensation in favor of all enlisted men who retired before June 1, 1942, as against those who have retired since that date or who will retire in the future. No justification for such discrimination is suggested. It could not be based upon any moral obligation to pay the plaintiff and those similarly situated what the law provided for them while they were in active service, and when they applied for retirement. That moral obligation is fulfilled by the increased pay provided in the 1942 Act which amounts to more than the aggregate, including the $15.75 of allowances, which the

plaintiff expected to get when he served and when he retired. It is guaranteed by the quoted provision of Section 19, which, as we interpret it, says that if, in any instance, the new pay does not add up to as much as the old pay and allowances, the larger amount shall nevertheless be paid.

There is no legislative history which is of substantial help in our problem of interpretation. But the plight of the country in 1942, and the perils which were confronting the men in active service, make it inconceivable to us that Congress would have, at that time, intended to enact what would have amounted to a gross discrimination against the men who were to face those perils, and in favor of those who were already in retirement. The plaintiff urges that the colloquy between a Mr. Lofgren, who appeared on behalf of the members of the Fleet Reserve Association, and the members of the Committee on Military Affairs of the House of Representatives, supports his interpretation. See Hearings of that Committee, 77th Congress, 2nd Session, on S. 2025, pp. 79–81, 83–84. As a result of Mr. Lofgren's testimony, the language of the first paragraph of Section 19, quoted above, which begins with the word "Provided", was inserted in the Act. But Mr. Lofgren, as the testimony and the inserted language shows, was interested in a special class of persons, those who had already transferred to the Fleet Reserve on the faith of the then existing statutory provision that they might transfer to the Fleet Reserve and later, because of physical disability, or on completion of thirty years' service, be retired. It seems that, as to them, or some of them, the pay under the new schedules for retired enlisted men would not be as much as the aggregate of pay and allowances which they would have received, upon retirement, if the old schedules had been left in force. Since they were not yet retired, the saving provision at the beginning of Section 19, would not assure them that they would ever get the compensation they had counted on upon retirement. Mr. Lofgren's representations to the Committee placed no emphasis on any separate retirement allowance. He merely showed the Committee how those whom he represented would receive less, upon retirement, under the new law, than the aggregate sums which they had expected to receive, under the old law, when they

became eligible for retirement. The Committee adopted his suggestion and inserted the second saving clause of the first paragraph of Section 19, using the same words, "pay, allowances, or compensation" which were already a part of the language of the first saving clause upon which the plaintiff relies.

The construction by courts of the word "or", as used in a statute or legal instrument, to mean "and" is commonplace. See the innumerable instances in 30 Words and Phrases, Permanent Edition, pp. 39–62. And there is something in the very fact of a saving clause which suggests, somewhat intangibly, that it is dealing with aggregate comparative results, not with separate items.

We conclude, therefore, that the plaintiff has received the compensation which the statute provides for him, and that his petition must be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CHESTNUT SECURITIES COMPANY v. THE UNITED STATES

[No. 46235. Decided October 1, 1945]

On the Proofs

Income tax; deduction for State taxes paid in year for which return is made by taxpayer which makes its returns on accrual basis.—Where plaintiff, a corporation which reported and paid its Federal income taxes on the accrual basis, in 1940 paid to the State of Oklahoma State income taxes for the years 1936, 1937 and 1938 on the income of certain intangible personal property; and where the Oklahoma taxes were paid under protest and plaintiff brought suit in the Federal Courts to recover, which suit was not finally decided against the plaintiff until 1942; and where in its Federal income tax return for 1940 plaintiff took deductions for taxes paid and interest paid to the State of Oklahoma in 1940, as above stated, which deductions were disallowed by the Commissioner of Internal Revenue; it is *held* that the determination of the Commissioner was not proper and plaintiff is entitled to recover.

Same; Security Flour Mills Co. v. Commissioner distinguished.—A taxpayer is not entitled to accrue a debt or other liability which is asserted against him but which he disputes and litigates and does not pay, until the litigation is concluded but if a liability is asserted against him and he pays it, though under protest, and though he promptly begins litigation to recover the money, the status of the liability is that it has been discharged by payment. *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, distinguished.

The Reporter's statement of the case:

Mr. Maxwell M. Mahany for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the evidence and an agreed statement of facts:

1. The plaintiff is a corporation incorporated under the laws of the State of Delaware on or about December 2, 1931, with its principal office and place of business at Wilmington, Delaware, and with places of business and offices at Dallas, Texas, and Tulsa, Oklahoma.

2. On February 28, 1941, plaintiff filed its federal corporation income, declared value excess-profits, and defense tax return for the calendar year 1940 with the Collector of Internal Revenue for the District of Delaware and paid the tax shown thereon to be due. This return was made upon the so-called "accrual" method of reporting income. It reported total income of $104,746.80, total deductions therefrom of $40,791.25, a net income of $63,955.55 and a total tax thereon of $1,320.83. Included among the claimed deductions and as interest in line 20 was the sum of $800.39 and as taxes on line 21 the sum of $8,452.48. In schedules attached to the return the interest item of $800.39 was shown as interest paid to the Oklahoma State Tax Commission and the item of taxes aggregating $8,452.48 was shown to include $5,590.98 paid as Oklahoma state income tax.

3. After an examination of plaintiff's books and records and the return mentioned above, a Revenue Agent in a report dated March 25, 1942, recommended an additional tax or

deficiency upon that return of $1,141.72 resulting from proposed adjustments as follows:

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$63, 955. 55
As corrected		71, 109. 32
Net adjustment as computed below		7, 153. 77
Unallowable deductions and additional income:		
(a) Depletion	$1, 012. 36	
(b) Oklahoma Income Tax	5, 564. 03	
(c) Interest	577. 38	
Net adjustment as above		$7, 153. 77

A copy of the Revenue Agent's report was transmitted to plaintiff on April 22, 1942, by the Revenue Agent in charge at Dallas, Texas.

On May 29, 1942, a so-called 90-day letter was addressed to the plaintiff by the Commissioner of Internal Revenue which proposed a deficiency of income tax in the amount of $1,141.72 upon plaintiff's return for the calendar year 1940. This sum, together with deficiency interest of $88.92, aggregating $1,230.64, was timely assessed and thereafter paid as follows: $926.80 was paid in cash on June 11, 1942; $214.92 was paid by statutory credit on November 28, 1942; and $88.92 was paid in cash on February 11, 1943.

4. On December 27, 1943, plaintiff filed a formal claim for refund with the Collector of Internal Revenue for the District of Delaware in the amount of $1,013.33, stating therein that the $5,564.03 Oklahoma income tax and the $577.38 interest thereon paid to the Oklahoma State Tax Commission during the year 1940 were proper deductions in computing taxable net income for the calendar year 1940. The facts relating to the Oklahoma tax were as follows:

Plaintiff was licensed as a foreign corporation to do business in the State of Oklahoma during the years herein involved. Its chief source of income was from interest and dividends upon corporate securities, together with income from joint operations of oil properties. The books and rec-

ords of plaintiff are kept upon the accrual basis and its return for income tax purposes has been made accordingly.

On March 5, 1935, the Supreme Court of the State of Oklahoma in the case of *Chestnut Securities Commission* v. *Oklahoma Tax Commission*, 173 Okla. 369, 48 P. (2d) 817, involving a franchise tax of plaintiff, rendered a decision holding that certain intangible personal property belonging to plaintiff did not have a "business situs" in the State of Oklahoma and that the intangibles were therefore not subject to the tax under the laws of Oklahoma, since the property was held outside the State and was not used nor employed in business transacted by the corporation within that State. Plaintiff in making its return for income tax purposes to the State of Oklahoma for the years 1936, 1937, and 1938 did not include as income the income received by virtue of ownership of that intangible personal property. In view of the Oklahoma court decision, plaintiff did not think it was required to include that income in its return. No effort was made by the State of Oklahoma to tax the income from these properties prior to 1940.

On or about May 8, 1940, the Oklahoma Tax Commission, through its agent, proposed the following additional assessments of income taxes against plaintiff by reason of the omission from income of the income derived from personal property held outside the State:

Year	Additional Tax
1936	$1,949.86
1937	1,541.95
1938	2,083.38
	$5,575.19

These deficiences were protested by plaintiff and on or about July 1, 1940, a hearing was had before the Oklahoma Tax Commission, which resulted in a decision by the Commission holding that the deficiencies in tax were due to the State of Oklahoma and, on or about August 24, 1940, plaintiff paid to the State the deficiencies with interest thereon, and at the same time, gave notice as required by statute of its intention to sue for their recovery. Pursuant to the laws of the State

of Oklahoma, the tax paid was held in a separate fund by the State of Oklahoma, pending the outcome of the suit.

On or about September 19, 1940, a suit for recovery of the taxes was instituted in the United States District Court for the Western District of Oklahoma, the case being styled *Chestnut Securities Company, a corporation, Plaintiff* v. *Oklahoma Tax Commission, Defendant*, and assigned Number 571 Civil. A trial was had and judgment was entered for the defendant Commission in the year 1940, from which plaintiff, in March 1941, took an appeal to the United States Circuit Court of Appeals for the 10th Circuit. On or about January 16, 1942, the Circuit Court of Appeals affirmed the judgment of the District court, the opinion being reported in 125 Fed. (2d) 571. The Supreme Court of the United States denied certiorari on April 13, 1942, 316 U. S. 668. The basis for the decision by the Circuit Court was that the intangible personal property which was almost identical with that involved in the first case above mentioned, decided by the Supreme Court of Oklahoma, had a "business situs" within the State of Oklahoma for the purpose of income taxation.

5. No part of the sum of $1,013.33 claimed for refund by plaintiff from the defendant, as shown in finding 4, has been refunded or repaid to the plaintiff.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, a Delaware corporation, reported and paid its federal income tax on the accrual basis. In the year 1940 it paid to the State of Oklahoma $5,575.19, with interest thereon, for state income taxes for the years 1936, 1937, and 1938, on the income of certain intangible personal property. The reason the plaintiff had not paid those taxes to the state in the years 1936, 1937, and 1938 was that it thought, because of a decision of the Supreme Court of Oklahoma, that the intangible personal property referred to did not have a taxable situs in Oklahoma and that therefore neither it nor its income could be taxed by that state.

In 1940, however, the state proposed to assess the tax for the years 1936, 1937, and 1938. The plaintiff protested, a hearing was had before the State Tax Commission which held that the tax was owed, and the plaintiff paid the tax, with interest, giving statutory notice of its intention to sue to get it back. Under the Oklahoma law the state held taxes so paid in a separate fund until the litigation was decided. The plaintiff sued in the United States District Court and lost, in the year 1940. The Circuit Court of Appeals affirmed and the Supreme Court of the United States denied certiorari in 1942.

In 1941 when the plaintiff filed its federal income tax return for the year 1940, it took deductions for taxes paid and interest paid to the State of Oklahoma in 1940 as recited above. The Commissioner of Internal Revenue disallowed the deductions and required the plaintiff to pay its taxes without the benefit of the deductions, which the plaintiff did, and filed a timely claim for refund. It sues here to recover $1,013.33, the amount which the disallowance of the deductions added to its income tax for 1940.

The Government concedes that under Section 23 of the Internal Revenue Code the plaintiff would have been entitled to the deductions claimed, if it had been making its returns on a cash basis. But, the Government urges, since the plaintiff's accounts were kept and its tax returns made on the accrual basis, it could not take its deduction for the taxes and interest paid to the State of Oklahoma until the year 1942, when its suit for their return was finally decided adversely to it.

We think the Government is wrong. One is not entitled to accrue a debt or other liability which is asserted against him but which he disputes and litigates, until the litigation is concluded. But if a liability is asserted against him and he pays it, though under protest, and though he promptly begins litigation to get the money back, the status of the liability is that it has been discharged by payment. It is hardly conceivable that a liability asserted against him, which he has discharged by payment, has not yet "accrued" within the meaning of the tax laws and the terminology of

accounting. Accrual, from the debtor's standpoint, precedes payment, and does not survive it.

The Government cites *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281. In that case the taxpayer in 1935 obtained an injunction against the collection of the tax, the court requiring as a condition of the granting of the injunction that the taxpayer pay the amount of the tax into a depository designated by the court. The taxpayer, on its income tax return for 1935 took deductions of the amounts paid into the depository, as taxes accrued in that year. The Supreme Court held that they had not accrued, within the meaning of the tax statutes. The court said "Since it denied liability for, and failed to pay, the tax during the taxable year 1935, it was not in a position in its tax accounting to treat the Government's claim as an accrued liability." In the instant case the taxpayer denied liability, but paid. We think it thereby "accrued" the taxes and interest, if accrual is requisite at all, in the case of the debtor, when actual payment has occurred.

The plaintiff is entitled to recover $1,013.33 with interest as provided by law.

It is so ordered.

Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

McCALL CORPORATION v. THE UNITED STATES

[No. 46369. Decided October 1, 1945]

On Defendant's Demurrer

Capital stock tax; adjusted value; liquidation of subsidiary.—Taxpayer was liable for capital stock tax assessed with respect to doing business by its subsidiary for the year in which the subsidiary was liquidated and in which taxpayer transferred to itself all the assets of the subsidiary. In determining the adjusted declared value of the capital stock, upon which the capital stock tax is based, the market value of the assets distributed (and not the value declared on the stock) is deductible from the original declared value of the stock. See *The Standard Stoker Company* v. *United States*, *ante*, p. 457.

Syllabus

Mr. Jesse B. Robinson for the plaintiff. *Messrs. Robert E. Coulson, James K. Polk,* and *Whitman, Ransom, Coulson & Goetz* were on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.,* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

PER CURIAM: This case is before us on demurrer.

Plaintiff sues for the capital stock tax assessed with respect to doing business by its subsidiary for the year in which the subsidiary was liquidated and in which it transferred all of its assets to plaintiff.

Defendant's demurrer is sustained, and plaintiff's petition is dismissed for the reasons given in the opinion this day filed in *The Standard Stoker Company, Inc.* v. *United States,* No. 46365. [*Ante,* p. 457.] It is so ordered.

ALLEN POPE v. THE UNITED STATES

[No. 45704. Decided October 1, 1945]*

On the Proofs

Government contract; decision upon remand by Supreme Court holding that Special Jurisdictional Act created new causes of action; judgment awarded in accordance therewith.—The decision of the Court of Claims in the instant case (100 C. Cls. 375), holding that the Special Jurisdictional Act (52 Stat. 1122) under which the suit was brought was unconstitutional, having been reversed by the Supreme Court (323 U. S. 1), in a decision holding that the Special Act did not award the plaintiff a new trial in the suit (No. K-366) formerly decided (76 C. Cls. 64) but rather created in the plaintiff a new cause of action where none had before existed, by so changing the law as to convert the plaintiff's moral claims, upon which he could not otherwise recover, because they had been adversely decided, into legal claims enforceable in the Court of Claims and the validity of the Special Act being thus established; it is *held,* upon the evidence adduced and upon the Supreme Court's interpretation of the Act, that plaintiff is entitled to recover:

*Plaintiff's petition for writ of certiorari denied January 2, 1946.

(A) For excavation work done, but not paid for, because the "B" or pay line of the tunnel was lowered by the contracting officer, 57 cubic yards at $17 per cubic yard, $969.00.

(B) For excavation of 287 cubic yards of cave-ins at $17 per cubic yard, due to omission of side-wall lagging by contracting officer's direction, $4,879.00.

(C) For filling with concrete the 287 cubic yards of caved-in spaces at $17 per cubic yard, $4,879.00.

(D) For dry-packing 4,746.9 cubic yards of space above the tunnel, at $3.00 per cubic yard, using the liquid method of measurement, $14,240.70.

(E) For 18,790.7 bags of cement used for grouting, not otherwise paid for, at $3.00 per bag, $56,372.10.

Same; no recovery for claim for excavation which was not asserted in prior suit and not explicitly set forth in Special Jurisdictional Act.—It is further *held* that the plaintiff is not entitled to recover for "excavation of materials which caved in over the tunnel arch," 4,781 cubic yards at $17 per yard, $81,277.00, since under the contract the plaintiff was not entitled to be paid for the disposition of any materials which fell from outside the "B" or pay line, and the special act creates no new cause of action for such work.

Same; compensation not contemplated by the contract.—The excavations in the tunnel were to be paid for on the basis of measurements in place, according to the lines shown on the drawing or called for by the specifications; and thus the materials which fell in from beyond the "B" line could not have been measured for payment, and were not intended by the contract to be so measured.

Same; testimony of plaintiff.—In his testimony in the former suit (K–366) the plaintiff indicated that the only way in which he could be compensated, under the contract, for the disposition of this caved-in material was by being paid for dry packing and grouting the space left vacant by the cave-ins, and in his suit he made no claim for any other compensation for such excavated materials.

Same; intent of Congress as shown by legislative history of Special Jurisdictional Act.—There is no intimation either in the Special Jurisdictional Act nor in the Committee Reports showing its legislative history that Congress intended to create, for the plaintiff, any new right to recover upon a claim for separate compensation for removal of the caved-in materials, to which the plaintiff in the course of a long controversy, followed by an extended litigation before the Act was passed, never asserted any right.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Messrs. King & King* were on the briefs.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Messrs. Newell A. Clapp, David L. Kreeger*, and *Miss Cecelia H. Goetz* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is the Allen Pope who was plaintiff in cause docketed as No. K–366, decided by this Court on March 7, 1932, and reported in 76 C. Cls. 64. The special findings of fact made therein by the Court are made a part of these findings by reference.

The plaintiff in case No. K–366 sued on a contract entered into December 3, 1924, for the construction of a section of a tunnel designed to carry water for the District of Columbia. In that suit the plaintiff was given judgment for $45,174.46. This judgment consisted of (1) an item of $13,290.22, representing the expense of substitutions ordered by the contracting officer in the method of carrying on the work, which substitutions were not authorized by the contract; (2) an item of $2,500 for timber used by the contractor and authorized by the contract; (3) an item of $231.54 for concrete actually placed and authorized by the contract to be placed; (4) an item of $500 earned, withheld and wrongfully retained for indemnification; (5) items aggregating $17,427.70 for excess work due to defendant's having furnished erroneous lines and grades, including the removal of 723 cubic yards of material caved in over the arch in the rock sections of the tunnel, and hereinafter to be referred to, and (6) an item of $11,225, damages for delay due to interference by the agents of the Government with the plaintiff's methods of construction.

2. Section V (1) of the petition in the instant case claims (a) $969, excavation of caved-in material, 57 cubic yards at $17 per yard between an original contract line, known as the "B" line, and the "B" line as lowered three inches by the contracting officer; (b) $4,879, for excavation of 287 cubic yards of cave-ins at $17 per yard, due to omission of side-

wall lagging; and (c) $4,879, for filling with concrete the 287 cubic yards of caved-in spaces at $17 per yard, a total of $10,727. This claim of $10,727 was made in Section XII of plaintiff's petition in case No. K-366. The Court's finding made relative thereto is No. XI, 76 C. Cls. 64, 74. Recovery was denied.

3. Section V (2) of the petition in the instant case claims $81,277 for excavation of 4,781 cubic yards of material at $17 per yard, caved-in over the tunnel arch. The petition sets forth the total cubic yardage of such material as 5,561 cubic yards, and excludes therefrom (a) 57 cubic yards claimed as above in Section V (2) of this petition, and (b) 723 cubic yards allowed for by the Court, finding X in case No. K-366, 76 C. Cls. 64, 73, and mentioned in finding No. 1 hereinabove. There is no claim in the original petition in case No. K-366 for the excavation as such of these 4,781 cubic yards, but there is therein a claim for grouting and drypacking the space voided by the caved-in material. See Sections IV and V of the original petition, case No. K-366. For drypacking in this area and grouting see the Court's findings in case No. K-366, findings III and IV, 76 C. Cls. 64, 65, 69, on which the Court allowed no recovery.

4. Section V (3) of the petition in the instant suit claims $14,240.70, which plaintiff says remains unpaid for dry packing the 5,561 cubic yards mentioned above (Section V (2) of the instant petition), being a balance of 4,746.9 cubic yards of dry packing at $3 per cubic yard, plaintiff having been paid for 814.1 cubic yards only on the contracting officer's estimate. This item is substantially Section V of the original petition. See the Court's findings in case No. K-366, findings III, IV, and VI, 76 C. Cls. 64, 65, 69, 72. No recovery was allowed on this item.

5. Section V (4) of the petition in the instant suit claims $56,362.10, for 18,790.7 bags of cement at $3 per bag. The correct extension is $56,372.10. This is a claim for grouting, embodied in Section IV of the original petition, and embraced in the court's findings Nos. III and VI in case No. K-366, 76 C. Cls. 64, 65, 72, there indicated as consisting of 13,891 bags of cement pumped in grout into cavities in the

timbered sections, not paid for, and 4,899.7 bags of cement used in grout poured into cavities in the rock section, the item of 4,899.7 bags being 9,032 bags consumed less 4,132.3 bags paid for. No recovery was allowed on this item.

The total number of bags of cement used in grouting, 22,923 bags, being the sum of 13,891 bags and 9,032 bags, converted by the liquid method described in the opinion of the Court, 76 C. Cls. 64, 85, using 40 percent of the dry-packed area as void, and one bag of cement to 2.62 cubic feet of grout, represents 5,561 cubic yards of space dry packed and grouted.

6. Unit prices named in the contract were, for excavating, $17 per cubic yard, for concrete work, $17 per cubic yard, for dry packing, $3 per cubic yard, and for grouting, $3 per bag of cement.

7. The specifications which were a part of the contract upon which the former suit, K–366, was based, contained, *inter alia*, the following provisions:

> 48. *Measurements.*—The quantities to be paid for will be determined by measurements made on the ground by the representatives of the contracting officer, of the finished work according to the lines shown on the drawing or called for by the specifications and by computations therefrom, and the actual quantities so determined will be used as a basis for payment.
>
> 58. *Excavation in Tunnel and End Structures.*—The excavation under this section includes all the work of this class necessary in the tunnel and for the end structures as shown on the drawings. The excavation in the tunnel shall be made within the prescribed limits as shown on the drawing and as described in these specifications. The contractor shall make all excavation in the tunnel in accordance with reference lines "A," "B," and "C" as shown on the drawing and described in paragraph number 33, but with the understanding that no excavation removed beyond the "B" line will be paid for.
>
> *   *   *   *   *
>
> 62. *Dry Packing and Grouting in Tunnel.*—No dry packing will be allowed except where necessary over the crown of the tunnel arch, in which case clean sound stones shall be used for packing and the spaces between such packing shall be thoroughly filled with grout, pumped into place, consisting of one part of Portland

cement and 2 parts of fine building sand mixed with a suitable amount of water.

Dry packing will be paid for by the cubic yard at the price bid by the contractor, the actual amount being determined by measuring the spaces so filled.

Grouting will be paid for by the number of bags of cement used in the grout, pumped into place and at the price bid by the contractor.

8. The excavation of the 57 cubic yards of materials between the B line as lowered, and the original B line, referred to in finding 2, would have had to be paid for under the contract if the contracting officer had not changed the plans by lowering the B line. The removal of the 287 yards of materials caved in from the side walls, referred to in finding 2, was made necessary by the contracting officer's direction to the plaintiff to omit the side wall timber lagging which would have prevented the cave-in of this material. The filling of the 287 yards of caved-in spaces with concrete, referred to in finding 2, was directed by the contracting officer. The removal of the materials which caved in from above the tunnel, referred to in finding 3, was not made necessary by any direction or default on the part of agents of the Government. The dry packing and grouting, referred to in findings 4 and 5, of the spaces left vacant by these cave-ins, was done at the direction of the contracting officer or his representative. All of the work mentioned in this finding was useful and beneficial to the Government. None of it has been paid for, but, as to the work of disposing of the materials which caved in from the top of the tunnel, the plaintiff will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for dry packing and grouting the spaces left by the cave-ins.

9. This case comes to this court under the special jurisdictional act of February 27, 1942, 56 Stat. 1122. The petition herein was filed July 7, 1942.

The court decided that the plaintiff was entitled to recover $81,339.80.

MADDEN, *Judge*, delivered the opinion of the court:

This suit was brought pursuant to the special act of Congress of February 27, 1942, 56 Stat. 1122. We rendered a decision on January 3, 1944, reported in 100 C. Cls. 375, holding that the special act was unconstitutional, as an attempted direction by Congress to this court to hear and decide again a case which the court had, in 1932, 76 C. Cls. 64, heard and decided under its general statutory jurisdiction, and to decide the case in a manner directed by Congress. Our decision that the special act was unconstitutional was reversed by the Supreme Court of the United States, 323 U. S. 1, that court holding that the special act did not award the plaintiff a new trial in the suit formerly decided, but rather created in the plaintiff a new cause of action where none had existed before, by so changing the law as to convert the plaintiff's moral claims, upon which he could not otherwise recover because they had been the subject of an adverse judgment, into legal claims, enforceable in this court. The Supreme Court held that Congress had the power to make such a change in the law for the benefit of a claimant against the United States.

The validity of the special act being thus established, we now proceed to its interpretation, and its application to the facts of the case. Its text is as follows:

AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon

the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

SEC. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

SEC. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

Section 2 of the special act, in lines 6 to 11, gives the plaintiff a cause of action for excavation and concrete work done, but not paid for because the "B" or pay line of the tunnel was lowered by the contracting officer. As shown in finding XI of the court's former decision, 76 C. Cls. 64, at page 74, there were 57 cubic yards of this excavation. The contract rate for excavation was $17 a yard. In line 2 of Section 2 of the special act, the plaintiff is given the right to recover at "contract rates," hence he recovers $969 for this excavation.

Lines 11 and 12 of the special act, read in connection with what precedes them, give the plaintiff the right to recover

at contract rates for the excavation and concrete work which the plaintiff had to do because of the contracting officer's direction to omit timber lagging from the side walls of the tunnel. The direction was given to save the Government money, as it would have had to pay for the timber at specified unit prices. But the result was that the walls, being friable, and not being held up by timbers, caved in extensively and the plaintiff was obliged to remove the caved-in materials and fill the spaces with concrete. There were 287 cubic yards of the caved-in materials, and hence 287 cubic yards of concrete. The contract price for concrete was $17 a yard, making $4,879 for the concrete. The contract price for excavation was also $17 a yard. The plaintiff therefore gets an additional $4,879 for removing these materials.

The greater amount of the plaintiff's claim is covered by that provision of Section 2 of the special act which directs us to determine and render judgment at contract rates upon the plaintiff's claim

> for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court [1] and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings [2] based on the number of bags of cement used in the grout actually pumped into the dry packing.

The process of dry packing and grouting consisted of packing all spaces left between the concrete top of the tunnel and the natural earth or rock in place above the tunnel, with dry stones, and then pumping a mixture of one part of cement and two parts of sand, watered to make it flow easily, into the mass of stones. The cement mixture flowed into the spaces between the stones and when it hardened, created a rigid mass which would prevent cave-ins above the roof of the tunnel or the accumulation of masses of water there.

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[1] The reference is to the court's former decision reported in 76 C. Cls. 64, at page 75.

[2] The reference is to 76 C. Cls. 64, finding III at page 65, and finding VI at page 72.

The plaintiff dry-packed and grouted large areas of space above the tunnel. In pouring the concrete roof of the tunnel he left manholes at intervals through which the stones could be lifted and packed into the empty spaces. He placed upright pipes through the concrete, so that the liquid grouting could be pumped up to where it would flow into the packed stones. But no measurement of the spaces so packed and grouted was made before the spaces were filled. At the original trial of the case the plaintiff urged that the volume of the spaces could be deduced from the known number of bags of cement used to make grout to fill the voids in the spaces. It was known that, when any given space was dry-packed with stones, as these spaces were, the crevices between the stones constituted on the average 40% of the packed space. It was known how many bags of cement, mixed with sand and water to make grout as specified, it would take to make a cubic yard of grout. Thus the total number of cubic yards of grout, and of packed and grouted spaces could be computed from the known number of bags of cement used.

The court, in the plaintiff's former suit, thought that computation by this method was not trustworthy, because it thought that large amounts of the grout mixed and pumped had not gone into dry-packed areas at all, but had gone into unpacked spaces in the earth or had been forced out into test holes or caved-in areas above the tunnel. We are now inclined to think that the liquid method of measurement is reasonably accurate. But in any event, the special act has given the plaintiff the right to have it used to measure his recovery, and it is, as a practical fact, the only method by which any measurement at all could now be made.

Computed by this method of measurement, the amount of space dry-packed and not otherwise paid for, is 4,746.9 cubic yards. The contract rate for dry packing is $3.00 per cubic yard. The plaintiff may therefore recover $14,240.70 for dry packing. The number of bags of cement used for grouting, and not otherwise paid for, was 18,790.7. The contract rate per bag for making grout out of the cement, and pumping the grout into place, was $3 per bag. The plaintiff may recover $56,372.10 for grouting.

The plaintiff claims $81,277.00 for "excavation of materials which caved in over the tunnel arch," 4,781 cubic yards at $17 per yard. The volume of these caved-in materials was not measured, and hence would have to be computed by the "liquid" measurement discussed above.

The Government urges that the plaintiff should not recover anything on this item of his claim. It says that, under the contract, the plaintiff was not entitled to be paid for the disposition of any materials which fell from outside the "B" or pay line, and that the special act creates no new cause of action for such work. The contract was explicit on this question. Section 58 of the specifications, quoted in finding 7, contains this sentence: "The contractor shall make all excavations in the tunnel in accordance with reference lines 'A,' 'B,' and 'C' as shown on the drawing and described in paragraph number 33, but with the understanding that no excavation removed beyond the 'B' line will be paid for * * *." The plaintiff's counsel suggests that when materials fell from above the B line into the tunnel space, and were thence removed, they were excavated from within the B line and hence should have been paid for, under the contract. That this was not the meaning of the contract is made plain by Section 48 of the specifications, quoted in finding 7, which shows that the quantities to be paid for were to be measured in place, "according to the lines shown on the drawing or called for by the specifications and by computations therefrom." Thus, materials which fell in from beyond the B line could not have been measured for payment, and were not intended to be so measured. That the plaintiff so understood the contract is also shown by the fact that in his former suit here on the contract he made no claim that the contract provided for payment for removal of such materials, and the fact that in that suit the plaintiff testified repeatedly, as quoted in 100 C. Cls. 375, at 385, 386, that the only way in which he could be compensated under the contract for the disposition of this caved-in material was by being paid for dry packing and grouting the space left vacant by the cave-ins.

The plaintiff urges that even though, under the contract, the plaintiff was under a duty to dispose of these materials without any separate compensation, the special act has given him a right to such compensation, and at the full contract rate of $17 per yard provided for excavation within the pay line. This asserted construction of the special act presents several difficulties.

First, it imputes to Congress an intention to create in the plaintiff a right to recover upon a claim to which the plaintiff, in the course of a long controversy followed by an extended litigation before the special act was passed, never asserted any right. Instead, the plaintiff had, in the previous litigation, expressly disclaimed any such right, in his testimony referred to above. What the plaintiff was complaining of in his former suit was that the Government had, in breach of contract, refused to pay him for his dry packing and grouting of the spaces left vacant by the cave-ins, and had *thereby* left him uncompensated for the disposition of the caved-in materials, as well as for the dry packing and grouting. The plaintiff did, in the former case, allege misrepresentations by the Government as to the nature of the soil through which the tunnel was to be built, and interferences by Government agents with his dry packing and grouting, by giving conflicting orders and in other ways. The court in the former case awarded the plaintiff the sums of $13,290.22 and $11,225 for unwarranted interference with his dry packing and grouting and with the order in which he did his work. See 76 C. Cls. at pp. 87 and 100. It decided that the Government had not been guilty of misrepresentation. If the plaintiff urged upon Congress any claim based upon these matters, there is no intimation either in the special act or the committee reports that Congress intended to create, for the plaintiff, rights to recover for them.

Second. As we have said, the plaintiff's grievance in regard to disposition of caved-in materials, dry packing, and grouting, throughout the former litigation was that, by being refused payment for the dry packing and grouting at the unit prices, he was being left uncompensated for all of the three related activities. He did not ask this court to give him

separate compensation for disposition of caved-in materials, and on the basis of his whole conduct of the case, and of his personal testimony, no intimation can be found of any legal or moral basis for such a claim. It could not possibly have been error on the part of the court to fail to give the plaintiff something which he did not ask for, and which he expressly disclaimed any right to have. Nor could it have been any defect in the law, or any failure of the law to accord with morals or good conscience, that caused the court not to award him something which he did not ask for. Yet the obvious purpose of the special act was to create specially, for the plaintiff, such rights as a correct decision under the general law, or a decision under law which accorded with good morals, if the general law did not, would have given him.

Third. Although we said, in our consideration of the constitutionality of the special act, 100 C. Cls. 375, 385, that the act, in effect, directed us to render a judgment for the plaintiff on the item now under discussion, we have, pursuant to the decision of the Supreme Court, given further consideration to the text of the special act and its legislative history, in order to ascertain the intent of Congress.

Section 2 of the act provides that we shall "render judgment at contract rates" for the two categories of work later specified in the section. The first, as we have seen, was excavation and concrete work performed in complying with change orders lowering the B line and omitting timber lagging from the side walls. As to these items, the contract rate is easily applied, since the placing of the concrete and the excavation or removal of the materials must be paid for separately if it is paid for at all. Though the cave-ins from the side resulting from the omission of the timber lagging fell from outside the pay line, the cause of their fall was the action of the Government's agent in omitting the lagging, hence the Government was morally obligated to pay for their removal, and the only applicable contract rate was, as we have said, the excavation rate.

The second item covered by Section 2, for which we are to render judgment at contract rates, is

> for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method * * * and the amount of grout to be as determined * * * based on the number of bags of cement used * * *.

The contract rate of compensation for disposition of materials caving in from above the tunnel, and for dry packing and grouting the spaces from which they had fallen, was the rate of payment for dry packing and grouting. The specifications, in Section 58, expressly provided that there would be no payment for materials outside the B line. See finding 7. Section 62 provided for payment for dry packing and grouting. The plaintiff intended that his compensation for removal of these cave-ins should come in his payment for filling the spaces. He protested on this ground when it was proposed that the voids be not filled at all, and brought suit on this ground when he was directed to fill the voids, but was not paid for doing so. He testified in the original case:

> The manner provided in the contract for reimbursing me for hauling out of the tunnel whatever rock or earth fell into it was covered in the compensation allowed me for dry packing and grout.
>
> * * * * *
>
> The only way I would get paid for removing that earth that fell down was when I refilled it with dry packing and grout *and my price for grout included the cost of removing the earth from the tunnel.* [Italics added.]

This and other testimony by the plaintiff to the same effect is quoted in our former opinion, 100 C. Cls. 375, 385, 386.

In the face of these statements, the truth of which cannot be disputed, we cannot conclude that the "contract rate" for the removal of the caved-in materials was, not only the amounts which the plaintiff had added to his dry packing and grouting unit price bids to cover this very work, but an

additional amount, considerably larger than both of the other amounts put together. It is not strange that the plaintiff, and Congress, should have mentioned the excavation, as well as the dry packing and grouting. Throughout the controversy the plaintiff had complained bitterly that he had removed the caved-in materials, and had dry packed and grouted the spaces from which they fell, and had been paid *nothing* for doing all three of the jobs. And he had consistently urged upon the contracting officer, and upon this court that, *under the contract* he was entitled to be paid the unit prices set in the contract for the dry packing and grouting, and *thereby* be paid for all three of the jobs. There was never any doubt in his mind, or any uncertainty in his claims, in those times, as to what the "contract rate" was. If he had openly presented to Congress a claim to be separately paid $17 a yard for the removal of the materials, *in addition to* the amount of his unit price bids for dry packing and grouting, what possible answer could he have made if the committee had become aware of his former claims and testimony? The inconsistency of the claim with his former position in this court would have undermined the whole basis of his complaint to Congress, which was that the court had erred in denying his claim. We think that in fact he had no intention of making such a claim to Congress, and that we have no right to seize upon the words "contract rates" used in the statute, search the contract for a rate, and apply it to work which the contract itself expressly said, and the plaintiff repeatedly said, carried no separate rate of compensation at all.

It is said that there might be some equity in our finding additional compensation for the plaintiff, because he claimed, unsuccessfully, in his former suit that the Government had misrepresented the geological formation, and that there was more material to be removed, and more dry packing and filling to be done, than he had anticipated. This court, in the former case, considered the plaintiff's claim of misrepresentation, and concluded that there had been none. The plaintiff in his statement to Congress did not press any claim of tortious misrepresentation, or suggest that this court had erred in holding that there was none. In his narrative de-

scription he speaks of "representations" as to the character of formations, but only to show why it was that there were more units of work than were anticipated. He does say that the specifications "warranted" the geological formations shown on them. The only apparent point of this statement is the same as that concerning the representations. There is no suggestion in his statement that he would not be adequately paid if he received the unit prices set by the contract for the work, even though there were more units of work than had been anticipated. If he had so claimed, it would, presumably, have occurred to the committee that, at least as to the estimated amount of the yardage stated in the specifications, there could be no possible equity in his claim for separate compensation for excavation, or for damages, because, as to the estimated amount, he knew he would have to remove it and the contract expressly said that he would not be separately paid for doing so.

The plaintiff urges that because there was a much larger volume of cave-ins from above the tunnel arch than had been anticipated, he was put to extra expense in that it was necessary to carry the materials out of the tunnel and then bring back those of the caved-in stones which were suitable for use in dry packing. He urges that this was a prime consideration which caused Congress to give him, in the special act, the right to the full contract rate for excavation for these materials.

In the plaintiff's petition in the former case, K-366, Section VI of the petition, beginning on page 4 of the record of that case, is headed "Government's Interference With Dry Packing and Grouting." He there narrates various acts of alleged interference which increased his expense, and, at the end of the section, itemizes them and states the amount which he claims for each. On page 9 appears the following, with regard to the cost of excessive handling of materials:

> (g) Specifications Par. 58 provided that suitable material excavated in the tunnel might be used for dry packing. Plaintiff rightfully expected to use such material as the work progressed and was ready to proceed thus in the untimbered sections on December 2, 1925. There was no storage space in the tunnel and in order to

> proceed it was necessary either to dry pack or to remove the stone from the tunnel. The officer would not allow the dry packing to proceed and required the stone to be removed from the tunnel and to be brought back again into the tunnel later, which procedure required the stone to be handled 10 more times than would have been otherwise necessary and which handling including 15% for incidentals amounts to $12,598.00.

The commissioner of this court, after hearing the evidence, found, at page 76 of the record of K–366, that the plaintiff's additional expense, including the costs of supervision, for "Extra handling of stone in dry pack," was $7,000. This court, in K–366 in its finding V, 76 C. Cls. 64, at page 70, dealt with the plaintiff's claim for damaging interferences with his work. It said, *inter alia*, in that finding: "The contractor had to handle by hand the stone required for such dry packing several times more than would have been necessary had the contractor been allowed to carry out his plan." After reciting other interferences, the court, at the end of the finding, said, at page 72:

> The extra expenses necessarily so incurred by the contractor, including a reasonable allowance for the time of the contractor himself, the wages actually paid the foreman and steady-time men during the period of performance, etc., amount to $13,290.22.

This $13,290.22 was included in the judgment in K–366 and has been paid to the plaintiff.

The above recital shows, concerning the extra cost of handling rock ultimately used as dry pack, which extra cost is urged as a reason why we should conclude that Congress intended to award the plaintiff a right to $81,277, that (1) the plaintiff in the former case, K–366, asked for only $12,598 for this expense, which amount included 15% for incidentals; (2) the commissioner of this court, after hearing the evidence, found that the extra expense was $7,000; (3) this court, in the former case, included in its judgment for the plaintiff the sum of $13,290.22, which, it is fairly certain from the court's language, included whatever amount of expense the court thought was attributable to the extra handling of stone. We think that the plaintiff did not intend to obtain from

Congress a right to $81,277 based upon a claim which he had valued at about one-seventh of that amount in his former suit, and which claim, in some unspecified amount, had been included in the former judgment and paid to him.

We cannot say that the "contract rate" for the disposition of these materials includes, in addition to the $3 per yard for dry packing and $3 per bag of cement for grouting, $17 per yard for removal, which removal the contract expressly provided should not be paid for.

The plaintiff, in his statement to Congress, after quoting the statement of the court that it had no jurisdiction to grant him a new trial after the lapse of so long a time, and that he would have to seek relief, if at all, in Congress, said: [3]

> All he (plaintiff) is asking is that the Congress, which alone has jurisdiction, direct the court to consider the case again and grant him relief as was denied him heretofore, and give him judgment * * *.
>
> Hence, it is pursuant to the very suggestions made by the court itself, both in its printed decision of December 6, 1937, and in its advices from the bench when the claimant appeared there with his last motion for new trial, that claimant now seeks relief through an act of the Congress which will confer upon the court jurisdiction to readjudicate his case.

In view of this statement to Congress, the plaintiff could not have intended, when he made it, to induce Congress to create in him a cause of action, half of which would consist of a claim not included, but on the other hand, expressly disclaimed by the plaintiff in the former suit.

In the plaintiff's statement to Congress, he treated under separate headings "Court exhibits establishing claim resulting from changes in contract plans," and "Other items of work for which claimant has not been paid." See pages 6, 7, and 8 of Report No. 865, referred to above. Under the second of these headings the plaintiff recites the facts of the cave-ins from the roof of the tunnel, and of the dry packing and grouting, done at the direction of the Government. He quotes the statement of the court that "No payment has been made for any of the dry packing nor

[3] Report No. 865, House of Representatives, 77th Congress, 1st Session, p. 5.

grout thus required to be used" and that "We have said that the plaintiff might recover for the total area dry packed and grouted. The obstacle in the way is the lack of proof defining the extent of space dry packed." The plaintiff then says:

> The pending bill would enable the court to determine the amount of dry packing by the so-called liquid method "as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing." From such evidence as has heretofore been presented to the court, and from such additional evidence as may be required, it would seem that the court can reasonably determine what dry packing and grout were supplied by the contractor for which he has never been paid.

There is not a word in this statement about any separate payment for the disposition of the materials which fell in from the top of the tunnel. There is no suggestion as to how the court should measure the amount of these materials, if their disposition was to be separately paid for, though the method of measurement was the very heart of the act, the plaintiff having lost the part of his former suit relating to the spaces left by these cave-ins solely for the reason that the court concluded that there was lack of proof of the extent of the spaces. If we were to conclude that the special act granted the plaintiff a right to a separate recovery for the removal of the caved-in materials, we would be left with no direction, except by inference, as to how to measure the volume of them. We do not think that the plaintiff, in securing a special act written for the particular purpose of meeting a defect of proof which had been fatal to his former case, would have left the measure of half of his recovery to inference. And if the plaintiff and Congress intended that he should have a separate claim for the disposition of these materials, and if they did not intend that we should infer from the silence of the special act that we should measure the cave-ins by the same deductive method by which we were directed to measure the volume of the dry packing, they were deliberately taking

a chance that the court would now, as it did in the original case, regard the liquid method of measurement as too untrustworthy to be the basis for a judgment, and that the plaintiff might recover nothing on this item, even under the special act. We have no idea that any such gap was inadvertently left in an act so meticulously drawn to accomplish so specific a purpose.

The Committee on Claims of the House of Representatives, in recommending the passage of the special act, summed up the purpose of the act as follows:[4]

> There is no questioning the fact that he was put to additional items of expense by reason of the change orders of the contracting officer; that the claimant did supply certain dry packing (stones put into place) and grout (liquid cement mortar pumped into the spaces between the dry packing); that this was done under orders and supervision of the contracting officer; and it was accepted by the Government inspectors after inspection thereof.
>
> The reported bill would enable the court to correct its error; reimburse him for the expenses to which he was put as the result of the change orders; determine the amount of dry packing "by the liquid method as described by the court and based on the volume of grout actually used" and determine the amount of grout supplied as established "by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing."

This statement by the Committee shows exactly the items upon which the plaintiff was to be given a right to recover, and the items there recited are the ones on which we have herein given the plaintiff judgment.

We have, hereinabove, allowed the plaintiff $4,879 for excavating 287 cubic yards of materials which fell in from the sides of the tunnel because, at the direction of the Contracting Officer, the timber lagging which would have prevented those cave-ins was omitted. That excavation, for which we allow compensation, is on a different footing from the removal of the materials which fell in from above the

[4] House Report No. 865, 77th Congress, 1st Session, p. 3. The Senate Report was identical. Senate Report No. 1019, 77th Congress, 2nd Session, p. 2.

tunnel. The former was made necessary by the express direction of the Government to omit the timber lagging which would have prevented it. The provision of the contract that payment would not be made for "excavation removed beyond the 'B' line" would not, in equity, excuse the Government from paying for such excavation if it was made necessary by the Government's direction. The special act expressly states that this work was "found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer." The court's finding XI, 76 C. Cls. 64, 74, bears this out. That finding also shows exactly how many yards of this excavation there were, and the contract rate for it. The plaintiff, in his former suit, claimed this amount, and failed to recover it only because the order of the contracting officer did not comply with the formalities required by the contract. 76 C. Cls. 96, 97. Payment for the concrete which filled the spaces left by these cave-ins was never intended to include payment for the removal of the caved-in materials.

On the other hand, the cave-ins from above the tunnel were, as we have said, not the result of any direction of the Contracting Officer; they were expressly excluded from payment by the contract; payment for their removal was not sought in the former suit except as such payment would be included in payments for dry packing and grouting the void spaces; no direction is given in the special act as to how their volume should be measured, unless that direction is obtained by inference; the committee report lacks any suggestion or hint that their removal is to be paid for, in addition to payment for dry packing and grouting. Our different treatment of the two items of excavation, then, is not only justified but compelled by the plaintiff's different treatment of them throughout this long controversy, and by the whole history of the former litigation and the special act.

In *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 49, the Supreme Court said:

> By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to

> grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms.

See also 2 Lewis' Sutherland Statutory Construction, 2nd Ed. Sec. 548; Crawford Interpretation of Laws, Sec. 245.

It is said that the jurisdictional act under which we are proceeding is plain and unambiguous. The length of the opinions which it has evoked seems to throw doubt upon that proposition. And of course the act cannot be applied and was never intended to be applied without examining the contract and the findings and opinion in the former suit to which the act refers. When we consult the contract, as we must, to ascertain the "contract rates" and find that the contract rate for excavating materials from inside the pay line is $17 a yard, but that the contract says, "no excavation beyond the 'B' line will be paid for," it would seem that we are faced with a problem of construction. If we at that point were inclined to be literal and to rely on "plain meaning" we would have to say, without further investigation, that the plaintiff was to get nothing for the excavation of the caved-in materials. We would not, however, be justified in stopping there, without ascertaining whether that literal, or "plain meaning" construction did not thwart the intention of Congress. So we go further into the relevant data to find out what the actual intent of the statute is, consistent with its language. We find that, as the plaintiff understood the contract when he bid for it, the contract rate for removing caved-in materials was included in the unit prices which he bid for dry packing and grouting, so that if he gets paid for those processes he will have been paid the "contract rate" for excavating the materials. We find that the plaintiff, in pressing his claim before Congress, summed up the purpose

of this part of the bill as enabling the court to give him a judgment for his dry packing and grouting. We find that the Committee summed up for Congress the purpose of the bill in substantially the same language. We therefore see no sufficient reason to hold that, after we have given the plaintiff a judgment which pays him, according to his repeated statements, for excavation, dry packing, and grouting, at contract rates, we should add to that judgment an additional sum, again paying him for one of the three operations for which he has already been paid, but the second payment being in an amount substantially larger than the "contract rate" for all three operations put together.

The plaintiff's statement to Congress, the Committee reports, and the special act are completely consistent with the plaintiff's claims and testimony in the former suit. They point to items on which the plaintiff sued but failed to recover in the former suit. As to those of the grounds upon which recovery was denied for lack of proof, they prescribe what should be adequate proof in this suit. They do not intimate that he is to recover more now than he could have recovered then even if the court or the law had not then been unduly technical. When we so interpret the special act as to make the plaintiff's former claims and testimony, his former failure in this court, his statement to Congress, the report of the Committee, which that statement induced, and the special act, one consistent whole, we have no doubt that we are giving to the plaintiff the full measure of relief which Congress intended him to have.

The plaintiff may recover $81,339.80. It is so ordered.

JONES, *Judge*, and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissenting in part: I concur in the opinion allowing plaintiff compensation under the Special Act at contract rates (1) for excavation and concrete because of materials that caved in at the side of the tunnel wall and the lowering of the "B" line, (2) for dry packing certain areas of the caved-in space over the tunnel arch, and (3) for grouting such dry-packed space, but I cannot concur in the conclusion

that the special jurisdictional act does not assume an obligation for and does not authorize the court to allow plaintiff compensation at the contract rate "for the work of excavating materials which caved in over the tunnel arch," to the extent the proof shows the amount of such caved-in material.

Sec. 1 of the Special Act (56 Stat. 1122) confers jurisdiction to hear, determine, and render judgment upon the claims of Allen Pope against the United States, "*as described* and *in the manner* set out in section 2 hereof." [Italics supplied.]

Sec. 2 proceeds to *describe* the claims and states that the compensation determined to be allowable under the obligation assumed as to the claims mentioned shall be at contract rates.

A study of the language of sections 1 and 2 shows, I think, that Congress authorized and directed the court to hear and determine, on the basis of the evidence, and to allow at contract rates such compensation as should be determined, on the basis of quantity, on all four claims, as follows:

> * * * namely, [at contract rates] for the excavation and concrete work found by the court [in the previous case] to have been performed by the said Pope in complying with certain orders of the contracting officer * * *; *and* [at contract rate] *for* the work of excavating materials which caved in over the tunnel arch, *and* [at contract rates] *for* filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based upon the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing. [Italics supplied.]

It will be seen that the language of the act separates each claim by the provision "and for" and impliedly repeats as to each claim the provision "at contract rate." The fact that the work of excavating the caved-in material and the work of dry packing and grouting the caved-in space over the tunnel arch were to some extent related items, because the dry pack and grout replaced some of the caved-in material, is not sufficient in view of the language of the act to warrant the

exclusion of compensation for the work of excavating such materials. The character of the work on each item was different. Each item involved independent labor and separate expense, and it was not necessary for the act to mention the excavation work in order to provide compensation for dry packing and grouting. Since there was a separate contract rate for each of these three items, and since Congress knew this from plaintiff's petition for relief, it would seem obvious that if Congress had not intended that the work of excavating the caved-in material be compensated for, as a separate item, it would not have mentioned that work at all. Since this item of excavation work was *described* as one of the claims to be compensated for *in the manner*, i. e., at the contract rate specified, the court has no alternative but to allow it to the extent of the amount of material excavated, since it is admitted that such material was removed.

A very large amount of material caved in from over the tunnel arch because of the geological formation encountered, which material had to be excavated from the tunnel in addition to the material which caved in from the spaces dry packed and grouted for which claim is made, but no measurement of the total amount of caved-in material was made at the time, and plaintiff claims, because of the impossibility of proof, compensation as for excavation for only such material as caved in from the space dry packed and grouted, the amount of which can be measured with reasonable accuracy by the "liquid method." Plaintiff's petition to Congress shows, as hereinafter stated, that he was claiming therein compensation only for the work of excavating the material which caved in from the space dry packed and grouted, which material, according to the undisputed record, was a great deal less than the total amount of material which actually caved in and was removed. It seems reasonably clear that plaintiff's reason for so limiting his claim to Congress for compensation for this excavation work was because that amount of material was susceptible of proof, whereas the total amount of material which caved in could not be proven.

The committee report, hereinafter mentioned, on the special act is consistent with the above-mentioned interpretation in accordance with the ordinary and natural meaning of the

language used in the act, but the reasoning in the majority opinion against this interpretation requires that certain additional matters be discussed.

While sec. 2 does not specifically state that the amount of excavated material which caved in over the tunnel arch is to be measured by the "liquid method" specified for measuring the space dry packed and grouted, neither does it prohibit its use. The method of determining the amount of caved-in material excavated is left open for determination by the court upon the evidence, since the court had not previously determined this one way or the other. In the previous case the court denied the claim for damages in which practically all, if not all, the extra cost of removing the caved-in material was included. The matter of measuring the amounts of dry pack and grout put into the caved-in space was specifically specified by Congress, because the court in deciding this claim for dry pack and grout had previously rejected the only method available for determining the amount of dry pack and grout. The provision that the court shall also determine the amount of compensation due at the contract rate for the work of excavating the caved-in material leaves the court free to determine the amount thereof by the use of the method specified for measuring the space dry packed and grouted, or some other method which it may find satisfactory for measuring the number of cubic yards of caved-in material. The important thing is that the act provides for the determination of this claim and the amount due thereon at the contract rate. Under the act the court may, if necessary, measure the cubic yardage of the caved-in material removed and to be paid for by applying thereto the exact number of cubic yards of caved-in space (liquid measurement) determined to have been dry packed and grouted; but it is not required to do this if there is in the record sufficient evidence to enable the court more accurately or satisfactorily to determine the cubic yardage of material which caved in from such space, either by using the liquid method or otherwise. The contract between the parties discloses they contemplated that due to normal overbreakage of rock there would probably be not more than

approximately 300 to 500 cubic yards of space outside the "B" line to be concreted or dry packed and grouted, but the handling of the material from such overbreakage was not to be paid for as excavation since it was contemplated that, except for about 500 feet at the end of the tunnel, the entire length of the tunnel of 3,540 feet would be in solid rock, and that rock sufficient to dry pack such space would not have to be removed from the tunnel and brought back. As a matter of fact very little, if any, of the roof of the tunnel was in solid rock that would hold without considerable cave-ins. The removal of such material was not, therefore, considered an item of expense of any importance. Cave-ins were not contemplated or mentioned. Par. 58 of the specifications simply stated that "No excavation removed beyond the 'B' line will be paid for." Plaintiff did not "excavate" beyond the "B" line and the court so held in K–366—the material caved in because of its character and unstable condition.

Par. 48 of the specifications required the contracting officer to keep a record of the measurement of such spaces as were caused by such overbreakage which were to be paid for, as refilled, at the contract rates for concrete, dry packing and grouting. The Government did not measure the caved-in space over the tunnel arch, other than by the liquid method which the contracting officer adopted. Since it was impossible after all of the caved-in material had been excavated from the tunnel and the space from which some of the caved-in material had come had been dry packed and grouted to prove by any other method the number of cubic yards in such space which would equal the number of cubic yards of material which caved in from such space, the Government is not now in a very favorable position to object under the special act to the use of the liquid method of measurement. That the liquid method of measurement is a recognized and reasonably accurate method of measuring, under normal conditions, the number of cubic yards in a particular space dry packed and grouted and of measuring the number of cubic yards of earth or rock that came out of such space is not denied by anyone. If it appears from the evidence that all or substantially all of the grout used in a caved-in space dry packed and grouted filled only the dry-packed voids in the space from

which material caved in and did not go elsewhere, or beyond such space, then the cubic yardage of such space measured by the liquid formula, or method, would accurately represent the cubic yardage of material that caved in therefrom. The contracting officer suggested, adopted, and used that method for determining the number of cubic yards contained in the caved-in space which was dry packed and grouted to the extent to which he made payment therefor, and the only question now for determination under the item of the claim under the special act for excavating the caved-in material (if such claim is within the authority conferred by the terms of the act) is whether the cubic yardage of the space dry packed and grouted determined by the liquid method reasonably or fairly represents the cubic yardage of the caved-in material removed. The matter of measuring the amount of such caved-in material from the dry-packed space will be further discussed later herein.

Defendant argues that sec. 2 of the Special Act is ambiguous, but I do not think it is when its language is given its natural and ordinary meaning as Congress appears to have intended; and it is further contended by defendant that "This claim [for excavating caved-in material] is completely untenable for the reason that payments made (or to be made) for the area thus dry packed and grouted also cover the work of excavation, and nothing in the Special Act requires dual payment for this item." This claim of ambiguity only arises if an attempt is made to read out of the act one of its provisions which, according to its language, calls for an allowance at the contract rate for excavating caved-in materials; and the claim that payment for the work of excavating such material is not authorized by the special act can find support only on the view that Congress did not mean what the act said; that it was intended by Congress that the court should compensate plaintiff only for those items of work for which he might have been, but was not, paid by the contracting officer under the terms of the contract, and that the claims of Pope for excavating the caved-in materials and for dry packing and grouting the caved-in space were all one claim for compensation at contract rates of $3 a cubic yard for dry pack-

ing and $3 a bag for cement grout only, and not for the additional work of excavating or removing the large and unexpected amounts of caved-in materials. If the Special Act did no more than to grant or direct a new trial and specify the basis of payment on claims which could be compensated for under the strict provisions of the contract between the parties, these contentions of defendant that plaintiff should not be compensated for the work of excavating the caved-in materials would carry weight, but the Supreme Court held that the act did not intend to grant or direct a new trial but assumed an obligation to compensate plaintiff for certain claims as to which no obligation then existed.

It is, of course, admitted that there was a contract rate for excavation, and it is also admitted that with respect to the first claim of plaintiff this rate of $17 a cubic yard for excavation must be applied to the removal of material that caved in from the sides of the tunnel in addition to $17 a cubic yard for concreting such caved-in space. It is further admitted that if the work of excavating the material which caved in over the tunnel arch is to be compensated for, the contract rate of $17 a cubic yard must, under the terms of the act, be paid therefor. For the work of excavating the caved-in material and concreting the caved-in space at the side of the tunnel, plaintiff receives $34 a cubic yard, whereas for the excavating, dry packing and grouting, which was no less difficult and important and caused more expense for labor and material than was anticipated, and of which work the Government also received the benefit, plaintiff will receive a total of $23 a cubic yard.

The Supreme Court in *Pope* v. *United States*, 323 U. S. 1, said that "The Special Act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had resolved against petitioner. * * * the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before." In other words, the provisions of the act show that Congress named the claims to be considered and determined, and specified the rates to be applied in measuring compensation on the claims so described for which it

was assuming an obligation independent of the previous decision of the court, as well as the technicalities of the contract provisions. In doing this Congress authorized and directed the use of a certain method of measurement which the court had previously rejected for the purpose of fixing the allowable compensation for dry packing and grouting certain of the caved-in space over the tunnel arch. Since the court had not passed upon the matter, as a separate item, of measuring the amount of caved-in material excavated, it was not deemed necessary for the act to specify the basis, or method, of measurement thereof. The approval by Congress of this method of measurement for the purpose specified permits its use to the extent applicable for measuring the amount of caved-in material removed and to be paid for, since, as to that claim, Congress not only recognized but stated in section 2 that the only material for which plaintiff was to be compensated as for excavation was that amount of the material which caved in from the space over the tunnel arch which was dry packed and grouted. As above stated, large amounts of material other than that which came from the space dry packed and grouted were also removed, but that material is not included in the terms of the act. The proof of record shows, and it is admitted, that at more than two places over considerable areas great amounts of material caved in from over the tunnel arch all the way to the surface of the earth which was from 40 to 100 feet above the tunnel arch; that caved-in material had to be removed from the tunnel, and, in addition, these caved-in spaces had to be refilled with earth from above. The material that came from the space dry packed and grouted was only a very small part of the material which caved in and had to be excavated. Plaintiff included his extra excavation costs and expenses in the claim made by him in Section XV of the petition in K–366, but in his petition to Congress limited his claim for compensation for excavation not paid for to the amount of material which caved in from the space over the tunnel arch which was dry packed and grouted.

The only difference between the method of measuring the space dry packed and grouted by the liquid formula and the method of measuring the caved-in space at the side of the

tunnel by the concrete method is that all the concrete used filled completely the caved-in space, whereas, in the case of grouting, some of the grout found its way under pressure into rock fissures or seams, or into a test hole, from which spaces there was no caved-in material to be removed. Because of this and because the Government had the benefit of the work, the liquid method of measuring dry pack and grout to be paid for at contract rates was specified. But the direction in the act that the amount of dry pack and grout to be paid for be so measured does not prove that Congress intended that plaintiff was not also to be allowed compensation at the contract rate for the specified work of removing the material which caved in from such space, for which work the Government also received the benefit, and which was directed by the contracting officer. By providing that the court determine plaintiff's claim "for the work of excavating materials which caved in over the tunnel arch" and compensate him therefor at the contract rate, the act leaves the court with no alternative in the circumstances other than the use of the liquid method for measuring as accurately as possible the amount of material which caved in from the space dry packed and grouted, but, as hereinbefore stated, the court is left free by the act to apply its best judgment to the question whether, in all the circumstances and under all the evidence originally submitted and later submitted under sec. 3 of the act, that method, or some modification of the number of cubic yards shown by it, fairly and reasonably shows the amount in cubic yards of the caved-in material removed. As hereinafter shown, the amount of the material which caved in over the tunnel arch can, under the evidence of record, be ascertained with reasonable accuracy by the liquid method of measurement.

I do not think that payment for excavating the comparatively small amount of caved-in material results "in dual payment" for this item, as defendant contends, but whether it does or not, if Congress has provided for it, as I think it has, the propriety or wisdom of that action may not be questioned by the court. It is true, and Congress evidently knew that the original contract did not provide for payment as for excavation of material which fell in from over and beyond the

"B" or "pay" line of the tunnel, either at the sides or over the tunnel arch, but the evidence of both parties shows they contemplated that only a small amount of material outside the "B" line would fall into the tunnel from normal overbreakage in blasting or in excavating, and that the rock material beyond the "B" line over the tunnel arch could and would be kept in the tunnel as the work progressed and later would be used as dry packing and would not, therefore, have to be removed from the tunnel and later be brought back at considerable extra expense. When more than ten times the expected amount of material caved in solely from the space dry packed, which was mostly earth and rotten or soft rock, and, by direction of the contracting officer, had to be removed and hard rock suitable for dry packing later brought back, there was considerable extra expense incident thereto.

The fact that the act, as the Supreme Court said, was "inartistically drawn," may not be availed of to exclude allowance on a claim which reasonably appears to be within its terms. The way in which the act is drawn makes it necessary, I think, to read the first clause of sec. 2, i. e., "The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope," into each of the four claims described following the word "namely." When this is done the item for excavating the material which caved in over the tunnel arch from the space dry packed and grouted stands out as one of the claims. That this is necessary is shown, I think, by the language of section 2 naming the claims to be determined and paid for.

As to the first claim, the act says, following the word "namely," "*for the* excavation and concrete work;" following this it says "*and for* the work of excavating materials which caved in over the tunnel arch;" it then says "*and for* filling *such caved-in spaces* with dry packing and grout." [Italics supplied.] Thus, it will be seen that the claims to be determined and compensated for at the "contract rates" were separately described and the court must give effect to all the provisions of the act. If Congress had intended that the court should compensate plaintiff at contract rates only for excavation and concrete work at the sides of the tunnel and for dry packing and grouting the caved-in space over the arch, it

would have had no occasion to mention the work of excavating the material which caved in from over the tunnel arch, and I think, if it had so intended, that matter would not have been mentioned or included in the act.

As I understand the majority opinion, the reason or ground for denying the right of plaintiff to recover on the item of his claim for excavating the caved-in material is, in substance, that plaintiff did not make or intend to make such a claim to Congress, and that although the act states that he is to be compensated "for the work of excavating materials which caved in over the tunnel arch," the history of the act, as disclosed by the committee report and the "Statement of Allen Pope," set forth in the committee report, does not show that Congress intended by this language that an allowance should be made as compensation for this work in addition to compensation at $3 a cubic yard for dry packing and $3 a bag for cement grout placed in caved-in space over the tunnel arch.

I do not think the act should be so interpreted under the well-established rule that a statute is to be interpreted and applied in accordance with the ordinary and natural meaning of the language used where the provisions of the statute are plain and unambiguous, and I think we have such a case here. *Scott* v. *Ben*, 6 Cranch 3, 7; *Carter's Heirs* v. *Cutting*, 8 Cranch 251, 252; *Kirk* v. *Smith, ex dem. Penn.*, 9 Wheat. 241, 272; *Gardner* v. *Collins*, 2 Pet. 58, 92; *Merchants' Insurance Co.* v. *Ritchie*, 5 Wall. 541, 545; *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Company* v. *Sulzberger*, 157 U. S. 1, 37; *United States* v. *Riggs*, 203 U. S. 136, 139; *Pennsylvania Railroad Company* v. *International Coal Mining Co.*, 230 U. S. 184, 190; *St. Louis, Iron Mountain & Southern Railway Company* v. *Craft*, 237 U. S. 648, 661; *Caminetti* v. *United States*, 242 U. S. 470, 490; *Thompson* v. *United States*, 246 U. S. 547, 551; *Standard Fashion Co.* v. *Magrane-Houston Company*, 258 U. S. 346, 356; *Takao Ozawa* v. *United States*, 260 U. S. 178, 194.

Since the act shows by the language used that plaintiff, as he claimed in his petition to Congress, is to be compensated at the contract rate for excavation, for the work of excavating

only the material which caved in from the space over the tunnel arch which was dry packed and grouted, and not for the work of excavating all the material which actually caved in from other spaces over the tunnel arch, I think we should give full effect to the specific direction given in the act.

Plaintiff pointed out in his petition or statement to Congress, which is quoted in the committee report, that there were unit-price contract rates for excavation, for concrete, for dry pack and for grout. I do not therefore see how the court can allow compensation at contract rates for the three claims—(1) excavation and concrete, (2) dry packing, and (3) grout,—named in the act and decline to allow any compensation "for the work of excavating materials which caved in over the tunnel arch" without, in effect, reading this provision out of the statute or holding that Congress did not mean what the act plainly said. Plaintiff further pointed out in his statement to Congress that all the claims, which were subsequently mentioned in the act, were before this court in his original case and had been denied, and that was true. He also pointed out at length the difference between the materials as recorded on the contract drawing and those encountered, and the large amount of caved-in material that had to be excavated from the tunnel by direction of the contracting officer. Plaintiff also included in his petition to Congress, as hereinafter shown, a claim that he had not been fully compensated for timbers used in the tunnel, which was a contract item for which he was entitled to payment, but this item of the claim for timber was not included in the Special Act. Neither did the act include anything for delays and prolongations of the work which plaintiff also pointed out to Congress. Plaintiff had claimed originally in K-366 an additional amount of $5,236.30 for 52,363 feet of lumber, b. m., at 10 cents a foot, and the court allowed $2,500.

Plaintiff originally made claim in this court for compensation on all four items of work named in the Special Act, as he pointed out to Congress, and these are the claims which, under the act, the court is directed to determine and upon which it is to render judgment at contract rates; the claim for work of excavating or removing the total amount

of material which caved in over the tunnel arch, which could not under the terms of the contract be made in the original case as a contract item, was included by plaintiff in the claim originally made in this court for breach of contract through alleged misrepresentations as to the character of materials to be encountered in excavating for the tunnel.

In this claim made in Section XV of the petition in K–366 plaintiff asserted and attempted to prove that because of the changed and unexpected conditions as a result of which the cave-ins occurred, for which he claimed the defendant was responsible, he was delayed 200 days and incurred extra costs for labor, etc., in the net amount of $85,915. In his first motion for a new trial in K–366, filed May 6, 1932, after discussing the disallowance of this claim by the court, plaintiff insisted as follows:

> The net additional cost to the contractor for excavation, on account of the geological formations being different than represented, was $85,915.
>
> DAMAGES CHECKED—ANOTHER BASIS FOR CLAIM
>
> A check on this figure, and a basis upon which plaintiff might reasonably make claim, in lieu of upon the basis of misrepresentation, is for that excavation which fell into but was excavated only from within the "B" line. * * * The proof discloses that 5,561 cubic yards of space were dry packed and that this space was created by the materials falling into the space within the "B" line. It is established that not any of this material was excavated outside the "B" line. So that in addition to the material which originally occupied the space within the "B" line, and which has been paid for, 5,561 cubic yards more were actually excavated within the "B" line and have not been paid for. At the price bid by the contractor, namely, the contract price of $17.00 per cubic yard, this amounts to $94,537.
>
> Both of these bases for damages, i. e., (1) damages because of misrepresentation, and (2) excavation actually made within the "B" line, grow out of the same cause, namely, that the ground was loose and fell in. The latter explanation comes strictly within the letter of the specifications.

It seems clear enough to me that in plaintiff's statement which the Claims Committee incorporated in its report on

the special act, plaintiff, in his petition to Congress for relief, adopted and asked compensation on account of the caved-in material on the second basis above mentioned in his motion for a new trial after pointing out the changed and unexpected conditions encountered, and the special act, which provides for compensation at the contract rate for excavating this material, is in accord and consistent with this claim of plaintiff in his petition for relief.

I think it must therefore be held from the history of the Special Act that plaintiff did make claim to Congress that he be compensated through a special act for this excavation work. It would seem from the representations made by plaintiff in his written statement, as set forth in the committee report, and by the language used in the act, that Congress concluded plaintiff should at least receive compensation for this work of excavating the material which caved in from the space dry packed and grouted, and therefore specified the contract rate for excavation as the basis for such payment. It would seem that Congress would not have provided in the act for compensation for excavating this material unless it understood from Pope's petition for relief, through a Special Act, that he was claiming compensation for this work.

As to the work of excavating or removing the caved-in material, the majority opinion says that "plaintiff intended that his compensation for removal of these cave-ins should come in his payment for filling the spaces" and makes reference to certain excerpts from plaintiff's testimony quoted in 100 C. Cls. 375, 386, with reference to his claim in the original case (76 C. Cls. 64) for compensation under the contract items of dry packing and grouting. But I do not think those excerpts are helpful or important in interpreting the Special Act. Any consideration of plaintiff's testimony in the original case in connection with what he was claiming in his petition to Congress should include all of his testimony, and not merely excerpts. It must be remembered, when considering the testimony referred to, that in the original case plaintiff had other and separate claims which he was pressing, and which included compensation for extra costs and expenses for removing the large amount of caved-in

material and other unanticipated expenses in connection with and by reason of the extensive cave-ins and on account of delay amounting in one instance to $66,782.45 concerning interferences with dry packing and grouting, and, in another, to $85,915 for extra costs and damages because of the cave-ins. Plaintiff's original testimony concerning what his prices for dry packing and grouting were intended to cover was obviously, as he now urges, with respect to the original estimated "overbreakage" of rock of not more than 500 cubic yards throughout the tunnel, of which amount less than 200 cubic yards would, in any event, have had to be ultimately disposed of other than by its use as dry packing; and, if the spaces vacated by the timbers had to be dry packed, as they were, practically none of the original estimated "overbreakage" of rock would have had to be handled extra or removed from the tunnel. Obviously, therefore, there were no cave-ins nor excavation expenses anticipated by or intended by plaintiff to be included in his bid prices for dry packing and grouting. There were many items of expense in connection with dry packing and grouting other than the cost of the cement used. Moreover, in view of what occurred with reference to the large amount of caved-in material, most of which was earth, as compared to what the parties expected with reference to the small amount of "overbreakage" of rock, and in view of the over-all time of 200 additional days consumed and the expenses incurred, the bid prices for dry packing and grouting cannot be regarded, and, evidently, they were not regarded by Congress as having been intended to cover the unanticipated and excess costs incurred. Plaintiff so testified in the original case in connection with the item of his claim for $85,915 in which these extra excavation expenses, except a portion for extra and unnecessary handling of rock used for dry pack, were included, and that testimony is not refuted.

As hereinafter pointed out in more detail, plaintiff, in his petition to Congress for relief, set forth under the third heading thereof that "During excavation, the ground caved in over the crown of the tunnel arch, such caved-in spaces were to be filled with stones packed in place, called dry

packing," and, under the fourth heading, that "The roof of the excavation caved in for the full length of the tunnel, 3,533 feet. * * *. Thus, more excavation resulted than had been expected. Next, the caved-in spaces had to be refilled with dry packing and grout, * * *. The items of expense which the contractor did incur had not been anticipated to such an extent by the Government or by the contractor; these items were the cost of removing all caved-in material from the tunnel, * * * and the cost of replacing the caved-in spaces with the specified dry packing and grout." Under the sixth heading, he stated that "As a result of this condition [unstable material] he was required to excavate material which caved in over the tunnel arch, and then to refill the caved-in spaces with dry packing and grout."

Congress evidently considered in connection with the Special Act that in all the circumstances, which were not expected by either party as plaintiff pointed out in his petition for relief, and in view of plaintiff's claims in that petition, there was a sufficient moral obligation to justify the assumption of a legal liability for certain extra work performed and expense incurred on account of this additional excavation, and concluded to measure the compensation to be allowed plaintiff by the court at the contract rate for excavation with respect to such of the caved-in material as came from the space dry-packed and grouted.

The majority opinion also makes reference to sec. VI of plaintiff's petition in the former case, K-366, quoting item (g) thereof, and also quoting a part of finding 5 of the court in that case (76 C. Cls. 64, 70) in support of the position that plaintiff in his petition to Congress did not make, or intend to make, a claim for compensation for the work of excavating caved-in materials.

I think, first, that in view of plaintiff's claim in his petition to Congress and the language of the act this reference to the record in the prior case is not important or necessary in interpreting and applying the Special Act according to its provisions; second, I think the quoted references when analyzed fall far short of indicating that which they are said to establish; third, the record in the original case

satisfactorily shows that plaintiff was not claiming in item (g) compensation or expenses for excavating caved-in materials, as such, but only for extra expenses incident to interferences with the work of certain dry packing which resulted in needless extra handling of stone necessary for this particular portion of the space dry packed; fourth, it does not appear from finding 5 and the opinion of the court in the prior case that the stone rèferred to represented caved-in material, or what amount, if any, was allowed on account of extra handling of this stone used in dry packing only 2,191 cubic yards of space over the tunnel arch; or, whether, if the court did allow any amount on account of this item, the extra expense of removing it from and bringing it back into the tunnel was included.

In the original petition plaintiff, in section IV, entitled "Cement grout," claimed $56,775; in section V, entitled "Dry packing," he claimed $14,304, as contract items at contract rates; and in section VI, entitled "Government's interferences with dry packing and grouting," plaintiff claimed $66,845.12 under nine separate items; the seventh, or item (g), is quoted in the majority opinion. Under this claim plaintiff alleged and proved, among other things, the following: "The contracting officer gave five (5) different orders with respect to the performance of the work of dry-packing and grouting. He changed the requirements with each order. He prevented performance within the contract period and required performance after expiration of the contract period, thus involving additional expense that would not have been incurred nor necessary had he permitted performance within the contract period, when plaintiff was ready and able and demanded to be allowed to perform in the manner agreed upon in the contract and which manner was the method ultimately used."

The commissioner of this court made finding 5 in which he listed the nine items and the amounts allowed by him in respect thereof, totaling $44,290.22. The court substantially adopted finding 5, except the tabulation of the items and the amount allowed as to each. The commissioner's tabulation in his finding and the amounts asked by plaintiff

under section VI of the petition in the former case, are as follows:

Items	*Allowed by Commissioner*	*Claimed by Plaintiff*
945 extra grout pipes, actual cost, $1,159.95 with 15 percent added for overhead, etc	$1,333.22	$1,333.22
Third or smaller set of grout pipes, material only, with 15 percent	138.00	138.00
Drilling out old grout pipes, restoring tracks, etc., with 15 percent added	4,769.00	4,769.00
Additional cost of grouting after February 11, 1927	9,000.00	14,686.00
Extra grout pumps	800.00	800.00
Extra cost of handling cement and sand for grout (loss of sacks)	750.00	750.00
Extra handling of stone in dry pack	7,000.00	12,598.00
Other fixed expense after December 24, 1926, not included in foregoing items, no part of which would have been necessary except for the contracting officer's orders needlessly prolonging the work after said date	18,000.00	28,109.47
Cost of so-called waterproofings, etc	2,500.00	3,598.76
Total extra cost of interference	44,290.22	66,782.45

Item (g) related to extra costs due to ten extra and needless handlings of rock used for dry packing only 2,191 cubic yards of space in the "rock section," and about one-half of these extra and needless handlings were shown to have related to the needless handling of the dry-packing stone because of the requirements and the conflicting and changed orders and directions by the contracting officer about the dry-packing work. The other half of the extra handlings of this stone appears to have related to taking the stone out of the tunnel and bringing it back. Plaintiff proved fifty cents a cubic yard for each handling, or a total of five dollars a cubic yard, which, with 15 percent added for overhead and incidentals, amounted to $12,598. The commissioner allowed the round figure of $7,000 on account of this item, which, it appears, was the cost of approximately one-half of the extra handling of this stone by hand, plus 15 percent. A study of the petition and the record in K-366 shows that this item (g) related only to extra expenses with reference to dry packing and, on its face, it did not relate and there is

nothing in the record to show that it related to or included any of the extra costs of the work of excavating the caved-in material from over the tunnel arch. Those costs were included by plaintiff in his claim for damages under sec. XV of the petition. Plaintiff's plan, with which the contracting officer unreasonably interfered, contemplated the use of sufficient stone from rock excavation within the "B" line, or from normal overbreakage to dry-pack whatever space was necessary without needless extra handling of such dry-packing stone, and item (g) referred to this unnecessary extra expense resulting from such interference, rather than the extra costs and expenses of removing caved-in material, as such extra costs were included in the claim made in sec. XV of the petition. The commissioner (and the court, if it allowed any amount on account of this item) appears to have made the allowance on that basis, inasmuch as approximately one-half of extra handling cost was excluded. No assertion or claim was ever made that plaintiff was making a double claim in sec. VI, par. (g), and sec. XV of his petition, in K-366, on account of extra work and expenses incident to and caused by the caved-in material.

In addition to this disallowance by the commissioner of $5,598.29, claimed by plaintiff under item (g), the record shows that this particular dry-pack stone, assuming that it was caved-in material, was only a very small portion of the caved-in material excavated, and was much less than the amount of caved-in material from the earth sections of the tunnel, which caved-in material was also excavated. Those earth sections were dry packed with stone from rock excavation as the work progressed, and amounted to 3,370 cubic yards. All costs resulting from the extra work and time on account of the large amount of caved-in material were included and claimed by plaintiff in sec. XV of the petition entitled "Misrepresentation." Under this section plaintiff claimed increased daily costs for delay and extra work due to cave-ins and unexpected conditions encountered of $433 a day, including his own time and equipment rental, and which also included proven labor costs of $242 a day. Outside of allowance for plaintiff's time and equipment rental, his actual proven daily costs under sec. XV were $283 a day,

or $56,660 for 200 days' delay in completion of the work. With such allowances his costs for that period were $99,590, from which amount he deducted $13,865 to cover the amount included elsewhere in the petition on account of delay incident to the cave-ins and the amount which defendant had paid him for some extra work during the delay period.

From the above it will be seen that, even if the court in its finding 5 and the opinion in 76 C. Cls. 64, 70, 86, 87, allowed the $7,000 found by the commissioner (and it does not specifically appear from the court's findings and opinion what amounts made up the $13,290.22 allowed), plaintiff got only a little more than one-half of its extra costs due to the extra handling of this amount of dry-pack material. When we look at finding 5 and the opinion of the court in K–366, *supra*, we find that the court substantially adopted the commissioner's finding 5, except the tabulation listing the items and the amounts allowed as to each and, in lieu of that tabulation, made an ultimate finding of a lump-sum allowance in respect to the nine items of only $13,290.22, which was $53,492.20 less than plaintiff claimed and exactly $31,000 less than the commissioner had found and allowed. An examination of the court's opinion at pp. 86–90 (76 C. Cls. 64) shows that the court disallowed the item of $18,-000 which the commissioner had allowed as damages for delay, and the item of $2,500 for waterproofing. These two items amount to $20,500.

For the reasons above stated I fail to see how it can be said from finding 5 in K–366 that plaintiff did not intend to make claim in his petition to Congress for compensation for excavating the caved-in materials. Instead, the foregoing analysis of finding 5, K–366, and sec. XV of the original petition would seem to show when considered in the light of plaintiff's statements in his petition to Congress, that he intended to and did make claim to Congress on account of the work of removing the material which caved in over the tunnel arch. In his original petition in this court plaintiff claimed, as indicated above, compensation on account of the cave-ins under sec. XV of his petition, and in his petition to Congress he stated that he had not been paid anything on account of the work of excavating the caved-in

material. From the language of the Special Act Congress appears to have agreed with him in this and also in his claim that he ought to be paid something therefor. As I have hereinbefore pointed out, the question whether such an allowance should have been made in the Special Act is a legislative rather than a judicial question.

Plaintiff's petition to Congress and the wording of the act show, I think, that the provision in the Special Act for compensating plaintiff at the contract rate for the work of excavating the material which caved in over the tunnel arch was not carelessly or inadvertently placed in the act.

The claims committee of the House, as appears from the Attorney General's letter of April 28, 1941, set forth in the committee report, asked the Attorney General for a report on the bill. In his letter the Attorney General stated his views on sec. 2 of the bill to be that it directed the court to determine and render judgment on certain claims of Pope for work performed for which he had not been paid, but of which the Government had recevied the use and benefit, and that "This work is described as certain excavation and concrete work performed pursuant to change orders and the excavation of caved-in spaces and the filling of such caved-in spaces with dry packing and grout." Thus, it seems that the view of the Attorney General from his reading of the bill was that by the language thereof plaintiff would be entitled to compensation thereunder at the contract rate "for the work of excavating materials which caved in over the tunnel arch." The Attorney General stated to the committee that he preferred not to make any suggestions since the question "whether or not the bill should be enacted is a question of legislative policy."

The written statement of plaintiff, entitled "Statement of Allen Pope," which is also included in the committee report, and on the basis of which statement the bill apparently was drafted and introduced, contained seven headings.

Under the first heading, "Necessity of Legislation," plaintiff set forth that he was asking Congress, "which alone has jurisdiction," to direct the court "to consider the case again and grant him relief as was denied him heretofore, and give him judgment whereby he can, in a measure at least, be re-

imbursed for expenditures to which he was put in building the tunnel * * *, and for which the Government has received the benefit, but for the greater part of which claimant has never been paid."

Under the second heading, "The Contract," plaintiff set forth the nature of the work and stated that the contract was a unit-price contract; that the work to be done was divided into ten different items, and that "payments were to be made on the basis of the unit prices bid for the various items and for as many units of work as were required to complete the project, irrespective of the quantities estimated in the specifications."

Under the third heading, "The Contract Project," the nature of the work and the size of the tunnel were described, and it was set forth that:

> The Government prepared the contract plans and indicated thereon certain representations as to the character of underground geological formations disclosed by the test borings made by the Government. The specifications warranted the descriptions given. The specifications also provided that when, during excavations, the ground caved in over the crown of the tunnel arch, such caved-in spaces were to be refilled with stones packed in place, called dry packing, and that the voids or spaces between such stones should be thoroughly filled with liquid cement mortar pumped into place. This cement mortar was to be made of specified proportions of sand, cement, and water, and was termed "grout". The 5 principal items which subsequently became involved in the issue of Pope's case in the Court of Claims were (1) excavation, (2) timber, (3) concrete, (4) dry packing, and (5) grout.

Under this heading, "Contract Project," plaintiff further set forth that the Government's estimate of quantities, upon which the contract was predicated, and bids were compared for award, was based on the geological representations given on the contract drawing which showed that the ground throughout the tunnel length would be substantially solid rock; that the Government, in addition to warranting its description of the geological formations disclosed by its test borings drilled on the site, obligated itself to give all lines and grades for performance of the work, to measure and

make a record of all completed work, and to pay therefor on the basis of the contract unit prices.

Under the fourth heading, "Conditions in performance giving rise to claims," plaintiff set forth in this statement that:

> During performance of the excavation the character of the geological formation actually encountered by the contractor proved to be much different from that described on the Government's plans. Instead of solid rock, as thereon depicted, standing in place when tunnelled into, the ground was wet, running earth, or soft, seamy, loose, unstable formation which caved in. The roof of the excavation caved in for the full length of the tunnel, 3,543 feet. This is in striking contrast to the contract drawing prepared by the Government, which shows the entire tunnel lying in a region of rock with more than 95 percent of it designated on the drawing as "hard rock."
>
> As a consequence of such conditions, which could not have been anticipated from the contract drawings, it was necessary for the contractor to perform far more units of work than the Government had anticipated. For example, large portions of the excavation had to be timbered, and this meant that the cross-section had to be enlarged to accommodate the timbers. Thus, more excavation resulted than had been expected. Next, the caved-in spaces had to be refilled with dry packing and grout, which meant the use of more rock and more concrete than had been anticipated. In fact, the amounts of timber, dry packing, and grout employed by the contractor, as directed, amounted to more than ten times the Government's contract estimate.

This seems to be a clear assertion of a claim for excavation, as well as for the items of dry packing and grout.

Plaintiff's statement continued, and said:

> Obviously, therefore, the *items of expense* which the contractor did incur had not been antipicated to such an extent by the Government or by the contractor; *these items were the cost of removing all caved-in materials from the tunnel, the cost of bracing and supporting the excavation with timber, and the cost of refilling the caved-in spaces with the specified dry packing and grout*, together with the expense caused by prolongations or by changes of methods of operations imposed by errors, and

> reversals of decisions by the contracting officer. *That, in a single sentence, is the substance of claimant's case.*
>
> Insofar as the Government failed to pay for the contract work which was necessary, which was directed to be done, and the benefit of which the Government has received, and insofar as its errors and interferences caused damage or otherwise unnecessary expense to the contractor, he now asks *redress through such relief as the court may grant him.* [Italics supplied].

From the above-mentioned portions of plaintiff's statement to Congress, which are consistent with the provisions of the special act and the committee report, it seems clear that plaintiff was making claim and that the committee and the Congress understood that he was making claim for compensation at contract rates, not only for the other claims mentioned but for the cost of excavating or removing all caved-in material from the tunnel as directed by the contracting officer. The provisions of the act substantially followed plaintiff's statement of his claims, except as to timbering and prolongations of the work. This court had previously in its findings and opinion (76 C. Cls. 64) made certain allowances to plaintiff for timber and interferences with the work, and it was doubtless for that reason that the special act did not include these items.

The claims committee in its report on the bill seems to have understood that under the terms of the act plaintiff would be compensated by the court for all excavation work performed by him at the direction of the contracting officer, along with other items mentioned, of which work the Government received the benefit, and for which plaintiff had not been paid.

Under the fifth heading of plaintiff's statement as set forth in the committee report, entitled "Court exhibits establishing claim resulting from changes in contract plans," plaintiff explained and asserted the first item of the claim specified in sec. 2 of the act, namely, for excavation and concrete work through the omission of timber lagging from the side walls of the tunnel, and the change of plans as to the "B" or "pay" line.

Under the sixth heading of plaintiff's statement, entitled "Other items of work for which claimant has not been paid," he set forth that:

> The court further found that the cost of excavating the tunnel was materially increased to the contractor, because he encountered much material that was soft, seamy rock and running earth, "materials contrary in formation from what he expected to encounter." As the result of this condition he was required to excavate materials which caved in over the tunnel arch, and then to fill the caved-in spaces with dry packing (stones put into place) and grout (liquid cement mortar which was pumped into the spaces between the dry packing, thus consolidating the whole into a solid mass). This was done at the direction of the contracting officer.

Under this heading the statement proceeds to set forth quotations from the findings of the court as to the extent to which the tunnel arch caved in, and as to the caved-in space over the arch outside of the "B" line being filled with dry packing and grout, for which no payment was made, and concluded such quotation from the court's findings, under the sixth heading, with a statement that "The pending bill would enable the court to determine the amount of dry-packing by the so-called liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing." This last-quoted statement, which was made only with reference to dry packing and grout, should not, in the light of other statements by plaintiff as to the claims which he was making, be treated as intending to exclude the claim for compensation for excavation.

From the statement set forth by plaintff under the sixth heading and other headings above-mentioned, it seems clear enough to me that he was claiming as one of the items of work for which he should be compensated, and for which he had not been paid, the excavation of caved-in materials as a result of the unstable sub-surface conditions mentioned, as a result of which he was required by direction of the contracting officer to excavate materials which caved in over the

tunnel arch, as well as for excavation of material that caved in from the side of the tunnel.

Under the seventh heading, entitled "Conclusion," plaintiff concluded his petition with the statement that:

> Reference of this matter again to the Court of Claims is, therefore, only just and equitable in order to obviate a hardship which has been imposed upon the contractor. Only in this way can the Congress enable the court to rectify its own mistake and compensate the contractor for the materials and labor which he furnished to the Government, which were necessary in the construction of the tunnel, which the contracting officer directed to be supplied, of which the Government has received the benefit and use these many years, and yet for which Pope has not been paid.

This "Conclusion" of plaintiff's statement included all four claims which had previously been set forth in his petition to Congress.

If we look therefore to the history of or the reasons for the Special Act introduced and passed for the relief of plaintiff we find that the provisions of the bill are in accordance with the claims which he made in his statement to Congress. The provisions in the act specifying the claims for which plaintiff is to be compensated accord with the claims made, and substantially use the language which plaintiff used more than once in his petition for relief.

In addition to the above-quoted statements from plaintiff's statement to Congress, the statements made by the claims committee in its report, not in form of quotations, indicate that the committee understood and interpreted the bill as plaintiff now claims, and show, also, that the committee was advising Congress that the bill provided for rendition of judgment by the court at the contract rates upon the four claims specified, one and a part of another of which were for "excavation" of caved-in materials. The committee said:

> The purpose of the bill is to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon certain claims of Allen Pope arising out of his construction of the tunnel * * *. The bill limits the jurisdiction of the court to certain items of

> work performed by the said Allen Pope in complying with orders of the contracting officer, for which items he has not been paid, but of which the Government has received the use and benefit, namely, certain excavation and concrete work and filling in of caved-in spaces with dry packing and grout. Payment to the said Pope by the court would be at the rates provided in the contract.

I think, therefore, that denial of judgment in favor of plaintiff at the contract rate "for the work of excavating materials which caved in over the tunnel arch," fails to carry out the authority and intention of Congress as set forth in the Special Act. Such denial of this claim seems to me to be contrary to the plain and unambiguous language of the act, to the petition of plaintiff to Congress, and to the statements of the Attorney General and the claims committee as to their understanding of the items of the claim which were to be compensated for under the act.

In order to justify the conclusion that full effect should not be given to the provision of the act providing for compensation at the contract rate for the work of excavating the caved-in materials, it would be necessary to show that it was the clear intention of Congress that this excavation work should not be compensated for at the contract rate as a separate item of the claim but that it was clearly intended to be embraced in and covered by such compensation as might be allowed at contract rates of $3 for each unit of dry packing and grout. All the evidence as to what the act intended seems to me to be opposed to such a conclusion. The history of the act as disclosed by the committee report is not consistent with such an interpretation of the language of the act, but, instead, this history as disclosed by the written statement of plaintiff, the report of the Attorney General to the committee, and the report of the claims committee are all consistent with plaintiff's interpretation of the provision of the act that he should be paid, as on other specified claims, at the contract rate for this excavation work. I would, therefore, give plaintiff judgment on this item of his claim.

The only question remaining is whether plaintiff should be paid at $17 a cubic yard, fixed by the act, for 4,781 cubic yards as the amount of the caved-in material removed, or for some smaller amount. He claims compensation for the

4,781 cubic yards. This amount is determined by the liquid method, hereinbefore mentioned, on the basis of the amount of grout used, which, by using the full amount of 22,923 bags of cement, shows a total of 5,561 cubic yards; of this amount, 57 cubic yards of caved-in material excavated are included and paid for at $17 a cubic yard under item one of the claim, due to the lowering of the upper "B" or "pay" line. In addition, the evidence shows that 723 cubic yards of material were previously allowed by the court and paid for. The deduction of these two amounts, totaling 780 cubic yards, leaves 4,781 cubic yards. As has been hereinbefore stated, the liquid method of measurement is the only method now available which can be used for reasonably measuring the amount of caved-in material over the tunnel arch; that method is reasonably accurate for measuring the number of cubic yards in a space dry packed and grouted. However, there is some evidence in the record which shows that all of the grout used, which is the basis of measurement, did not go entirely into the 40 percent dry-pack voids in the caved-in spaces, but that some of the grout found its way into rock fissures or seams, and into a test hole bored above the caved-in spaces before the construction work was commenced. In view of this, and the extent to which grout went into spaces other than the space from which material caved in and had to be removed from the tunnel, the liquid method of measurement does not measure with absolute accuracy the number of cubic yards of caved-in material. There is in the record, however, credible and convincing evidence to show that the amount of such extra grout over the amount which was necessary, and which did go to fill the dry-pack voids, was not more than 300 bags of cement. By deducting 300 of the 22,923 bags of cement actually used in grouting, as representing the amount of grout forced into voids other than in the actual caved-in dry-packed space, we have 22,623 bags of cement used to grout the space from which it is shown and admitted material actually caved in and was excavated. The liquid method of measurement based on 22,623 bags of cement shows 5,488.17 cubic yards of caved-in material which were removed. The deduction from this amount of the 780 cubic yards, above

mentioned, leaves 4,708.17 cubic yards. At the contract rate specified in the act of $17 a cubic yard for the work of excavating this amount, 4,708.17 cubic yards, plaintiff is entitled to judgment of $80,038.89 on this item, and I think judgment should be entered accordingly.

WHITAKER, *Judge*, concurs in the foregoing opinion.

SEABOARD ICE COMPANY v. UNITED STATES OF AMERICA

[No. 45911. Decided June 4, 1945. Defendant's motion for new trial overruled October 1, 1945]

On the Proofs

Income tax; undistributed profits tax; credits; contract restricting dividends of corporation.—Where an indenture securing the general mortgage bonds of taxpayer suspended the running of interest on such bonds until September 1, 1938, at which time the taxpayer's serial notes and serial bonds were scheduled to mature; and where the indenture prohibited payment of dividends until all unpaid interest on the general mortgage bonds was paid in full or funds therefor were deposited with the corporate trustee; it was *held* that the taxpayer was entitled to a credit against its undistributed profits in the taxable years in the amount of its earnings which were required to be used to discharge its indebtedness on its serial notes and serial bonds maturing in the two taxable years ending August 31, 1938.

Same; purpose of undistributed profits tax.—The tax on undistributed profits had for its purpose the improvement of business conditions by putting money into circulation by compelling a corporation to distribute its profits, and, hence, if a corporation could not distribute its profits without violating a written contract it was exempted from the tax to that extent.

Same; contract in writing.—The requirement that the prohibitory contract be in writing was for the manifest purpose of avoiding controversy as to whether or not there was such a contract.

The Reporter's statement of the case:

Mr. Richard F. Canning for the plaintiff.

Mr. Andrew P. Quinn was on the brief.

Mr. H. S. Fessenden, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the evidence and a stipulation of facts entered into between the parties:

1. The plaintiff is a corporation organized under the laws of the State of New Jersey and having its principal place of business in Neptune City, in said State.

2. On or about November 15, 1937, the plaintiff duly filed with the Collector of Internal Revenue for the District of New Jersey its corporation income and excess-profits tax return for the fiscal year ending August 31, 1937, showing a total normal tax of $90.42 and a total surtax on undistributed profits of $74.57, which taxes were paid to said Collector on the date of the filing of the return.

3. On or about November 19, 1938, plaintiff filed with said Collector a tentative corporation income and excess-profits tax return for the fiscal year ending August 31, 1938, and on or about November 29, 1938, filed its completed corporation income and excess-profits tax return for said fiscal year ending August 31, 1938, which return showed a net loss and no tax liability.

4. On September 7, 1939, plaintiff paid to said Collector additional sums in payment of deficiencies in normal tax, surtax, and excess-profits tax asserted by the Commissioner of Internal Revenue for the fiscal year ending August 31, 1937, as follows:

Normal tax	$3, 363. 08
Surtax	4, 754. 42
Interest	868. 34
Excess profits tax	40. 62
Interest	4. 35
Total	9, 030. 81

Thereafter, further adjustments were made in plaintiff's invested capital for the year ending August 31, 1937, which resulted in the determination of a deficiency in excess-profits tax for said year of $101.09, and interest thereon of $13.42, and overpayments of normal tax of $13.14, surtax of $19.79, and interest previously paid of $3.49. The said overpayments were credited by the Commissioner of Internal Revenue against plaintiff's deficiency in excess-profits tax, and

thereafter on February 27, 1940, plaintiff paid $78.09 to said Collector, which was the remaining unpaid portion of the said deficiency in excess-profits tax and interest determined to be due thereon for the fiscal year ending August 31, 1937.

5. On September 7, 1939, plaintiff paid to said Collector deficiencies asserted by the Commissioner of Internal Revenue for the fiscal year ending August 31, 1938, as follows:

Normal tax	$786.07
Surtax	643.61
Interest	67.15
Total	1,496.83

6. In computing the amount of surtax due, which is the tax levied on undistributed profits, the Commissioner did not allow plaintiff a credit for the amount of its earnings for the fiscal years ending in 1937 and 1938 which were required to be used to pay $165,612 of Secured Serial Notes assumed by plaintiff, hereinafter referred to, and the amount required to be used to discharge the installments maturing within said fiscal years on the Serial Mortgage Bonds of the company, hereinafter referred to.

7. On January 29, 1940, plaintiff filed with said Collector a claim for refund of income and excess profits taxes in the sum of $5,518.16 for the fiscal year ending August 31, 1937, and a claim for refund of income taxes in the sum of $1,199.19 for the fiscal year ending August 31, 1938, alleging in each claim the following grounds therefor:

(a) The allowance for depreciation upon the plant owned by the taxpayer and located at Neptune City, New Jersey, should be increased.

(b) The plaintiff is entitled to a credit under Section 26 (c) (1) and (2) of the Revenue Act of 1936 for undistributed profits surtax purposes by reason of a contract restricting payment of dividends. The credit claimed was for the amount of its earnings which were required to be used to discharge the Secured Serial Notes and the installments on its Serial Mortgage Bonds which matured within the fiscal years in question.

8. The Commissioner of Internal Revenue allowed plaintiff's claim for additional depreciation as a deduction from

income which resulted in the refund to plaintiff for the fiscal year ending August 31, 1937, normal tax of $189.85, surtax of $285.86, interest paid thereon of $49.87, excess profits tax of $83.18, interest paid thereon of $10.43, or a total of $619.19, together with interest thereon of $104.68; and by reason of said allowance refunded for the fiscal year ending August 31, 1938, normal tax of $172.52, surtax of $229.39, and interest paid thereon of $26.07, or a total of $427.98, together with interest thereon of $73.88. By letter dated August 20, 1942, the Commissioner of Internal Revenue advised plaintiff by registered mail of the disallowance of its claims for refund for the fiscal years ending August 31, 1937, and August 31, 1938, to the extent not previously allowed.

9. During the year 1933 the Seaboard Ice Company, a Maine corporation, owned the entire capital stock of the Ice Service Corporation, which latter company owned and operated a new ice manufacturing plant built during said year 1933. The Seaboard Ice Company of Maine determined it would be unable to meet the interest payment on its first mortgage bonds and debentures due on December 1, 1933. A voluntary petition in bankruptcy was therefore filed and the company was adjudicated a voluntary bankrupt in the United States District Court for the District of New Jersey on November 29, 1933. The funded debt and capitalization of the bankrupt at such time were as follows:

First Mortgage Bonds	$650, 000. 00.
10-Year 7% Debentures	$300, 000. 00.
10-Year 8% Income Bonds	$300, 000. 00.
6% Secured Demand Notes (Secured by pledge of stock of Ice Service Corporation and $135,869.92 principal amount of demand notes of Ice Service Corporation payable to Seaboard Ice Company).	$90, 000. 00.
Preferred stock without par value	4, 802 shares.
Common stock without par value	24, 802 shares.

The funded debt and capitalization of Ice Service Corporation as of November 29, 1933, were as follows:

6% Secured Serial Notes (Secured by First Mortgage to York Ice Machinery Co.).	$165, 612. 00.
6% Unsecured Demand Notes (Including $135,869.92 pledged as noted above).	$142, 369. 92.
Common stock—$100 par	10 shares.

10. A committee was formed by the holders of the first mortgage bonds, debentures, income bonds, and secured demand notes of the bankrupt, Seaboard Ice Company of Maine, to protect their interests. On August 27, 1934, the committee submitted a plan of reorganization to the security holders of the bankrupt for approval. This plan was subsequently assented to by the required percentage of security holders of the bankrupt, was approved by the Referee in Bankruptcy, and was consummated in accordance with its terms. The plan provided for the organization of plaintiff, Seaboard Ice Company, under the laws of New Jersey, to take over the assets of the bankrupt, Seaboard Ice Company of Maine and Ice Service Corporation, and to issue securities of the new corporation in exchange for securities of the bankrupt and its subsidiary, as follows:

Securities of the Bankrupt and Ice Service Corporation	*Securities of New Corporation to be issued in Exchange Therefor*
$165,612. 6% Secured Serial Notes of Ice Service Corporation.	No new securities to be issued, the existing obligations to be assumed by the new corporation.*
$90,000. 6% Secured Demand Notes of the Bankrupt with all unpaid accrued interest (secured by stock and notes of Ice Service Corporation).	$95,000. 6% Serial Mortgage Bonds ($30,000. due August 31, 1937; $30,000. due August 31, 1938; and $35,000. due August 31, 1939).
$650,000. First Mortgage Bonds of the Bankrupt with all unpaid accrued interest.	$702,000. General Mortgage Bonds due 1949 (4% fixed and 2½% income interest, both accruing from September 1, 1938 or earlier).
$300,000. 10-Year 7% Debentures.	3,600 shares Common Stock.
$300,000. 10-Year 8% Income Bonds.	2,400 shares Common Stock.

11. Pursuant to the plan of reorganization, plaintiff under date of February 1, 1935, executed a Mortgage Indenture to the Rhode Island Hospital Trust Company and Raymond H. Trott, Trustees, securing an issue of General Mortgage

*These notes mature as follows: $13,801 each on September 1, October 1, November 1, and December 1, 1934, September 1, October 1, November 1, and December 1, 1935, and September 1, October 1, November 1, and December 1, 1936.

Bonds in the amount of $702,000. Article II, section 1, of the Indenture reads in part as follows:

> The Bonds shall bear interest at a fixed rate of four per cent (4%) per annum (herein called fixed interest) from September 1, 1938, or from the interest payment date (March first or September first) next succeeding the date on which all of the 6% Secured Serial Notes and all of the 6% Serial Mortgage Bonds of the Company shall have been paid off, whichever is the earlier, and such interest shall be payable semi-annually on March first and September first beginning with the interest payment date next succeeding the date on which said interest begins to accrue.
>
> The Bonds shall also be entitled to receive additional interest (herein called income interest) at the rate of two and one-half percent (2½%) per annum from the beginning of the fiscal year of the Company during which the 4% fixed interest shall begin to accrue if such fixed interest shall begin to accrue on September first, or from the beginning of the next succeeding fiscal year if such fixed interest shall begin to accrue on March first, but said income interest shall accrue and be payable only if and to the extent that the same shall be earned in the fiscal year in which it accrues or in some subsequent fiscal year, as hereinafter in Article V hereof provided.
>
> Notwithstanding any of the above provisions or any other provisions of the Bonds or this Indenture in regard to the payment of interest, no interest, fixed or income, shall be paid on the Bonds so long as any default shall exist as to the principal of or interest on the 6% Serial Mortgage Bonds of the Company.

Article V, section 7, of the Indenture provides as follows:

> The Company covenants that no dividends will be declared or paid by the Company on any of its stock unless and until all accumulated unpaid interest fixed and/or income on said Bonds to the date of the declaration of such dividend shall have been paid in full or funds for the payment thereof shall have been deposited with the Corporate Trustee under this Indenture.

During the period from February 1, 1935, to September 1, 1938, plaintiff completely liquidated the $165,612 6% Secured Serial Notes of Ice Service Corporation and the $95,000 6% Serial Mortgage Bonds of plaintiff without

default of either principal or interest. Interest began to accrue on the $702,000 General Mortgage Bonds of plaintiff as of September 1, 1938.

12. During the period from January 7, 1935, the date of its incorporation, to August 31, 1938, plaintiff paid no dividends on its common stock.

The court decided that the plaintiff was entitled to recover.

Entry of judgment was suspended to await the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report by a commissioner, showing the amount of the refund due, computed in accordance with this opinion.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover the undistributed profits taxes assessed against it for the fiscal years ending August 31, 1937, and August 31, 1938. It alleges the assessments were erroneous because it was not given the credit allowed by section 26 (c) (1) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648, 1664). This section allows a credit for earnings that were not distributed because of a prohibition against the payment of dividends contained in a written contract entered into prior to May 1, 1936.[1]

This tax on undistributed profits had for its primary purpose the improvement of business conditions by putting money into circulation. It was intended to compel corporations to distribute their profits. So, if a corporation could not distribute its profits without violating a written contract, it was exempted from the tax to this extent.

The requirement that the prohibitory contract be in writing was for the manifest purpose of avoiding controversy as to whether or not there was such a contract.

Since, to be exempt, the contract must have been in writing, our question is, was there a written contract that prohibited the payment of dividends in the years in question. The

[1] This section reads in part:
"(c) CONTRACTS RESTRICTING PAYMENT OF DIVIDENDS.
"(1) *Prohibition on payment of dividends.*—An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. * * *"

plaintiff says the indenture securing its General Mortgage Bonds was such a contract.

In determining whether or not this indenture does in fact prohibit the payment of dividends, we must give effect, of course, not only to its letter, but also to all inferences that may be fairly drawn therefrom. If the contract deals with the payment of dividends and payment of the particular dividends in question is impliedly prohibited by it, it is as much prohibited by a "written contract" as if prohibited by its letter. Also, in determining the intent of the parties as evidenced by the written contract, we may and should take into account all the facts and circumstances surrounding its execution.

The contract in question was entered into under the following circumstances: The plaintiff, a New Jersey corporation, is the successor of the Seaboard Ice Company of Maine. This latter company, hereinafter referred to as the old company, owned all the capital stock of the Ice Service Corporation. The old company, finding itself unable to meet the interest on its bonds and debentures due December 1, 1933, filed a voluntary petition in bankruptcy and was adjudicated a bankrupt on November 29, 1933. The holders of its securities later proposed and secured the adoption of a plan of reorganization under which plaintiff (1) assumed $165,612 of the Secured Serial Notes of the Ice Service Corporation; (2) issued $95,000 of Serial Mortgage Bonds for $90,000 of Secured Demand Notes of the old company; (3) issued $702,000 of General Mortgage Bonds for $650,000 of the First Mortgage Bonds of the old company; and (4) gave common stock for the old company's debentures and income bonds.

The Secured Serial Notes assumed by plaintiff matured on the first day of September, October, November and December in 1934, and on the first day of the same months in 1935 and 1936. The $95,000 of Serial Mortgage Bonds matured: $30,000 on August 31, 1937; $30,000 on August 31, 1938; and $35,000 on August 31, 1939. It is the tax on that part of plaintiff's earnings that, it is said, were required to be used to pay the Secured Serial notes and the Serial Mortgage Bonds maturing between the date of plaintiff's incorporation and September 1, 1938, that is in issue.

The indenture upon which plaintiff relies reads in article II, section 1, as follows:

> The Bonds shall bear interest at a fixed rate of four per cent (4%) per annum (herein called fixed interest) from September 1, 1938, or from the interest payment date (March first or September first) next succeeding the date on which all of the 6% Secured Serial Notes and all of the 6% Serial Mortgage Bonds of the Company shall have been paid off, whichever is the earlier, and such interest shall be payable semi-annually on March first and September first, beginning with the interest payment date next succeeding the date on which said interest begins to accrue.
>
> The Bonds shall also be entitled to receive additional interest (herein called income interest) at the rate of two and one-half per cent (2½%) per annum from the beginning of the fiscal year of the Company during which the 4% fixed interest shall begin to accrue if such fixed interest shall begin to accrue on September first, or from the beginning of the next succeeding fiscal year if such fixed interest shall begin to accrue on March first, but said income interest shall accrue and be payable only if and to the extent that the same shall be earned in the fiscal year in which it accrues or in some subsequent fiscal year, as hereinafter in Article V hereof provided.
>
> Notwithstanding any of the above provisions or any other provisions of the Bonds or this Indenture in regard to the payment of interest, no interest, fixed or income, shall be paid on the Bonds so long as any default shall exist as to the principal of or interest on the 6% Serial Mortgage Bonds of the Company.

Article V, section 7 thereof, reads:

> The Company covenants that no dividends will be declared or paid by the Company on any of its stock unless and until all accumulated unpaid interest, fixed and/or income, on said Bonds to the date of the declaration of such dividend shall have been paid in full or funds for the payment thereof shall have been deposited with the Corporate Trustee under this Indenture.

It was evidently in order that plaintiff might use its earnings to pay off its indebtedness evidenced by the serial notes and bonds as they matured that the running of interest on

the $702,000 of General Mortgage Bonds was deferred from February 1, 1935, the date of the indenture, until September 1, 1938, by which time all the serial notes would have matured and all but $35,000 of the serial bonds would have matured. Section 1 of article II of the indenture provided, as seen, that interest on the bonds would not begin to accrue until September 1, 1938, unless the Secured Serial Notes and Serial Mortgage Bonds were paid off before that time, in which event interest would begin to run on the next interest payment date following the date these securities were paid in full. The deferment of the running of interest was evidently in order that earnings might be devoted to the payment of this indebtedness.

If, instead of paying this indebtedness, the company had paid out its earnings in dividends, we think it would have breached its agreement with its creditors. Indeed, a declaration of a dividend would not only have been a breach of contract, it also would have been unlawful while these debts were due and outstanding. Some of the notes were past due when they were assumed by plaintiff, others matured monthly beginning in September of 1935, and others matured monthly beginning in September 1936. One installment on the Serial Mortgage Bonds matured in the fiscal year ending in 1937, and another in the one ending in 1938. Until a corporation pays or provides for the payment of its debts that are due, it cannot lawfully declare dividends. *Fletcher Cyclopedia Corporations*, section 5340, and cases cited.

Not only was it the intention to prohibit the payment of dividends before September 1, 1938, unless the Secured Serial Notes and Serial Mortgage Bonds were paid off earlier, but it was also the intention to prevent the payment of dividends until all unpaid and accumulated interest on the General Mortgage Bonds had been paid, as set out in Article V, section 7, of the indenture, *supra*.

So, reading all the pertinent provisions of the instrument together, it seems that it was the intention of the parties that between the date of plaintiff's organization and September 1, 1938, the earnings of the company were to be

devoted, first, to the payment of the Secured Serial Notes and to the payment of such installments of the Serial Mortgage Bonds as matured before that time; second, beginning on September 1, 1938, if the Serial Mortgage Bonds had not been paid before this time, to the payment of the remaining installment on the Serial Mortgage Bonds (last paragraph of article II, section 1, *supra*); third, to the payment of interest on the General Mortgage Bonds; and, lastly, to the payment of dividends. If this was the intention, and we think it was, the declaration of a dividend in either of the fiscal years in question, before the Secured Serial Notes and the Serial Mortgage Bonds were paid, was prohibited by the written instrument upon which plaintiff relies.

Plaintiff is entitled to a credit against the undistributed profits tax for the fiscal years ending in 1937 and 1938 of the amount of its earnings which were required to be used in each of the fiscal years to discharge its indebtedness on the Secured Serial Notes and the Serial Mortgage Bonds maturing in those years.

Judgment will be suspended to await the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report by a commissioner, showing the amount of the refund due, computed in accordance with this opinion. It is so ordered.

MADDEN, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the above opinion and upon a stipulation by the parties, it was ordered, December 3, 1945, on plaintiff's motion for judgment, that judgment be entered for plaintiff in the sum of $4,523.34 for the fiscal year ended August 31, 1937, and in the sum of $414.22 for the fiscal year ended August 31, 1938, a total of $4,937.56, with interest as provided by law.

ROBERT MORSS LOVETT v. THE UNITED STATES

[No. 46026]

GOODWIN B. WATSON v. THE UNITED STATES

[No. 46027]

WILLIAM E. DODD, JR. v. THE UNITED STATES

[No. 46028]

[Decided November 5, 1945]*

On the Proofs

Suits for salaries; jurisdiction.—The general jurisdiction of the Court of Claims (Section 145 of the Judicial Code) in pay cases is too well known and established to require examination; and where Section 304 of the Urgent Deficiency Appropriation Act, under consideration in the instant case (57 Stat. 431, 450), contains no provision denying the court's jurisdiction, inferences will not be employed to go to the extent of holding that Congress went so far as to deny the plaintiffs their day in court.

Same; constitutionality.—The constitutionality of an Act of Congress is always presumed, and the Court will not gratuitously avail itself of questionable but inapplicable elements in an act and thereby hold it to be unconstitutional. Assuming, in the instant case, that provisions in section 304, not here operative, are invalid the Court will not undertake to say that the whole section would then fall for invalidity.

Same; provisions of the statute.—Section 304 refers to an actual appropriation which was admittedly and specifically available for the payment of the salaries due to plaintiffs for services rendered; and the Act of Congress did not limit the appropriation but merely directed that the disbursing officers of the Government should not pay "any part of the salary, or other compensation, for the personal services" of the plaintiffs, who were designated by name.

Same; statute not to be construed beyond its express terms.—Section 304 did not terminate the services of plaintiffs, who were lawfully in office; the original appointments were not affected, the offices were not disturbed, and their compensation was not changed; and the section is not to be construed beyond its express, explicit terms, nor beyond its incidence in time.

Same; decisions as to lack of appropriation.—In a long line of cases, beginning with *King* v. *United States*, 1 C. Cls. 38, it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due.

*Defendant's petitions (by the Attorney General) for writs of certiorari pending.

Same; Court of Claims deals only with legal liabilities of the United States.—The provision in Section 304 that no available appropriation shall be used to pay the salaries of plaintiffs in the instant cases does not affect the decision of the Court of Claims, which was "established for the sole purpose of investigating claims against the Government, does not deal with questions of appropriations but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress or the regulations of the executive departments." *Collins* v. *United States*, 15 C. Cls. 22.

Same; limitations of the statute; constitutionality of authority of Congress to stop payment immaterial.—Where the Act provided an appropriation for the salaries of the plaintiffs; and where the Act did not separate the plaintiffs from office, did not take away the salaries of their offices, and did not prohibit plaintiffs from receiving their salaries, but merely prohibited the disbursing officers to pay their salaries after a certain date; it is immaterial whether the Congress did or did not have the constitutional authority to stop payment.

Same; plaintiffs entitled to recover in respective suits for salaries.—The instant suits being merely suits for salaries, where it is established that the salaries have not been paid, that the obligation on the part of the Government to pay was never destroyed, and that the obligation continues; it is *held* that the plaintiffs are entitled to recover.

The Reporter's statement of the case:

Mr. Charles A. Horsky for the plaintiffs. *Mr. Edward B. Burling*, *Miss Amy Ruth Mahin*, and *Covington, Burling, Rublee, Acheson & Shorb*, were on the briefs.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the Attorney General. *Messrs. Donald B. MacGuineas* and *Henry Weihofen* were on the brief.

Mr. John C. Gall for the Congress of the United States. *Messrs. Dean Hill Stanley*, *William F. Howe*, *Karl M. Dollak*, *Jos. G. Butts, Jr.*, *John E. Ritzert*, and *Clark M. Robertson* were on the briefs.

The court made special findings of fact as follows upon the stipulation entered into between the parties:

No. 46026. *Robert Morss Lovett* v. *The United States.*

States and at the time of the filing of this suit was a resident
1. Plaintiff, Robert Morss Lovett, is a citizen of the United
of the Virgin Islands.

2. Plaintiff was commissioned the United States Government Secretary of the Virgin Islands on April 28, 1939, having been appointed by the President pursuant to Section 21 of the Organic Act of the Virgin Islands (Act of June 22, 1936). Plaintiff took the oath of office on July 17, 1939. On August 26, 1943, plaintiff was appointed Executive Assistant to the Governor of the Virgin Islands by the Secretary of Interior, pursuant to authority granted in Section 23 of the Organic Act of the Virgin Islands (Act of June 22, 1936) to succeed Mr. W. M. Freeman, who had resigned. Plaintiff entered on duty as such Executive Assistant on October 12, 1943.

3. The compensation for the position of Executive Assistant to the Governor of the Virgin Islands is fixed at a base rate of $4,600 per annum plus a 25 percent differential for services outside of the Continental United States, plus overtime computed in accordance with the War Overtime Pay Act of 1943. Plaintiff has performed the duties incident to the position of Executive Assistant to the Governor of the Virgin Islands from October 12, 1943 through March 13, 1944. On March 6, 1944, Harold L. Ickes, Secretary of the Interior, wrote plaintiff as follows:

> MY DEAR MR. LOVETT: Last November, I authorized you to continue your services to the Government after November 15, in spite of the provision of section 304 of the Urgent Deficiency Act (Public Law 132, 78th Cong.), which prohibited the use of appropriated funds for the payment of your salary. The principal purpose of that authorization was to make it possible for you to test by legal action the validity of section 304. You have continued to serve the Government without receiving your salary since November 15, 1943.
>
> As you no doubt know, this Department has been bitterly criticized by the Congress in recent months for continuing to accept them after you had worked for a period which would permit you to test the constitutionality of Congressional action. In these circumstances I have concluded that I have no alternative but to request your resignation.
>
> The matter is now before the Court of Claims, and I believe that the position taken by this Department and by yourself will be vindicated, in which case you will receive all the salary which you have earned. I want

again to acknowledge the respect and affection in which you are held by the people of the Virgin Islands and to assure you of my own highest regards and esteem.

With best wishes to you and to Mrs. Lovett, I am

Sincerely yours,

(s) HAROLD L. ICKES,
Secretary of the Interior.

On March 13, 1944, plaintiff wrote Harold L. Ickes, Secretary of the Interior, as follows:

MY DEAR MR. ICKES: In accordance with your request, I am sending you my resignation as Executive Assistant to the Governor of the Virgin Islands, effective at the close of March 13, 1944. I do so with regret because of my pleasant relations during the past five years with the people of the Virgin Islands. I thank you for the opportunity of living among them and serving them in conjunction with my colleagues of all departments whose friendship and cooperation will always be a happy memory. For your own encouragement and support, and that of the Department, I shall always be profoundly grateful. It is obvious that the Department should not bear any longer the burden of the personal hostility toward me of members of Congress, and that I can best serve the people of the Virgin Islands by leaving them.

Sincerely yours,

(s) ROBERT M. LOVETT.

4. Harold L. Ickes is the duly appointed, qualified and acting Secretary of the Interior of the United States. As such, he is head of the Department of the Interior and exercises general supervision and control over the Executive Branch of the Government of the Virgin Islands. As Secretary of the Interior, he has the power of appointment of various of the executive and administrative officers and employees of the United States in the Executive Branch of the Government of the Virgin Islands, including the appointment of plaintiff to his position as Executive Assistant, pursuant to authority granted in the Organic Act of the Virgin Islands (Act of June 22, 1936). As Secretary of the Interior, he, or someone acting on his behalf, has the duty of signing all requisitions for the advance or payment of money out of the Treasury for expenditures of business of the Department, including expenditures for the administration of the Virgin Islands.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These rules were first published in the Congressional Record of June 2, 1943 (Congressional Record, 78th Congress, 1st Session, Appendix, p. 7962). The Sub-Committee conducted hearings from April 9 to April 15, 1943, to investigate certain charges made, *inter alia*, against plaintiff. The hearings before the Sub-Committee were held in executive session. Plaintiff was invited by letter handed him on April 14 to appear in person before the Sub-Committee on April 15 and make such statements or explanations under oath as he might desire, and to answer such questions as might be propounded. The invitation advised plaintiff that if he was unacquainted with the charges and allegations concerning him, a copy would be furnished upon request. No such request was made by plaintiff. Plaintiff was shown at the hearing 54 charges made against him by the Committee on Un-American Activities of the House of Representatives, 78th Congress, 1st Session, acting pursuant to H. R. 282. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others, which were considered by the Sub-Committee in connection with plaintiff's case, were and are confidential, except that the charges formulated by the Committee on Un-American Activities were shown to plaintiff at the hearing as above stated. The Solicitor of the Department of Interior, on the day before the hearing on April 15, 1943, requested permission to appear at the hearing before the Sub-Committee with plaintiff. He was advised by the Committee that his request to appear as an observer for the Department of the Interior would be considered. On the following day, the Solicitor was informed that the policy of the Sub-Committee, already formulated in prior hearings involving persons connected with the Federal Communications Com-

mission, was to hold its hearings without any persons other than the Sub-Committee, its staff, and the witness being present. The plaintiff was not proffered, nor did he request, the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff. No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to his membership and activity in various organizations and with respect to various writings, speeches and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation. At the close of the hearing, plaintiff was also accorded an opportunity to make any statements he wished, but registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

6. On May 14, 1943, the Special Sub-Committee of the Committee on Appropriations reported to the Committee on Appropriations. On May 14, 1943, the Committee on Appropriations submitted a report (H. Rep. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714). Section 304 of the Urgent Deficiency Appropriation Act of 1943 of July 12, 1943, as finally enacted (Public 132), provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued

prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

The President did not appoint plaintiff under Section 304.

7. By letter of November 23, 1943, Morris F. de Castro, Commissioner of Finance of the Virgin Islands and the officer authorized to certify the payment of salary to plaintiff, advised the Secretary of the Interior that in view of Section 304 of the Urgent Deficiency Appropriation Act of 1943, he would not certify for payment the salary of plaintiff after November 15, 1943.

8. By letter of November 26, 1943, Harold L. Ickes, Secretary of the Interior, wrote plaintiff as follows:

> MY DEAR MR. LOVETT: When you were last in Washington I discussed with you the implications of section 304 of the Urgent Deficiencies Act. During these conferences I urged, despite the prohibition, your staying on the job after November 15, for the reason that the limitations contained in section 304 are, in my opinion and in the opinion of my Solicitor, an unwarranted interference with my executive powers.
>
> I wish to repeat the request that you continue in the office of Executive Assistant to the Governor. Funds may not be available to pay your salary until the unconstitutional prohibition of the Urgent Deficiencies Act is declared invalid by the courts. I am confident, however, that the prohibition will be so adjudged, and a principle fundamental to democratic government will be upheld.
>
> In no case are you to consider yourself discharged. You will continue to perform the duties of your office and to exercise all the authority conferred upon you by law.
>
> Sincerely yours,
>
> (s) HAROLD L. ICKES,
> *Secretary of the Interior.*

9. On November 29, 1943, the Secretary of the Interior wrote the following letter to plaintiff:

> MY DEAR MR. LOVETT: The Commissioner of Finance of the Virgin Islands has advised me that in view of

section 304 of the Urgent Deficiency Bill (Public Law 132, 78th Cong.) funds are not available to pay your salary after November 15, 1943.

During the past four years you have won the respect and affection of all of the Virgin Islanders, and you have, under very trying circumstances, served the Governments of the Virgin Islands and the United States with credit and distinction.

If there were some appropriate way to avoid the effect of the provision of the Deficiency Act, you would, of course, receive your salary. I should like very much for you to continue in the office of Executive Assistant to the Governor. It would be most difficult for me to find someone to replace you. The matter, however, now is beyond my control. I made every effort to prevent the adoption of the prohibitive provisions of the bill. The action taken by Congress has been very disappointing to me. I hope that you will be successful in challenging the constitutionality of the measure which otherwise prevents the disbursing officers of the Government from paying you the salary for which you are rendering such valuable services.

With my best wishes, I remain,

Sincerely yours,

(s) HAROLD L. ICKES,
Secretary of the Interior.

Plaintiff demanded that he be paid for the services rendered to the United States as Executive Assistant to the Governor of the Virgin Islands from November 15, 1943, through March 13, 1944. This demand was refused.

10. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has not received compensation from November 15, 1943, through March 13, 1944, nor has plaintiff ever received his pro rata annual base salary, plus differential and overtime, or any part thereof, for the services rendered during that period. The defendant, acting through Harold L. Ickes, Secretary of the Interior, his agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay to plaintiff any compensation for the period

from November 15, 1943, through March 13, 1944, nor has the defendant ever paid plaintiff his pro rata base salary, plus differential and overtime, or any part thereof, for the services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $1,996.40.

No. 46027. *Goodwin B. Watson* v. *The United States.*

1. Plaintiff, Goodwin B. Watson, is a citizen of the United States and at the time of the filing of this suit was a resident of Washington, District of Columbia.

2. Plaintiff was appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, on November 16, 1941, by the Federal Communications Commission in the exercise of its authority granted by Section 4 of the Federal Communications Act of 1934. Plaintiff took the oath of office on November 16, 1941.

3. Since October 20, 1942, the compensation for the position of Chief of the Analysis Division has been fixed at a base rate of $6,500 per year, plus, since May 1, 1943, overtime computed in accordance with the War Overtime Pay Act of 1943. Plaintiff has performed the duties incident to the position of Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, from November 16, 1941, through November 21, 1943. On May 2, 1944, plaintiff wrote to Dr. Robert D. Leigh, Director of the Foreign Broadcast Intelligence Service, Federal Communications Commission, as follows:

> DEAR MR. LEIGH: As I understand it, the reduction in appropriation for the Foreign Broadcast Intelligence Service makes necessary the elimination of the Analysis Division and the absorption of some of its work by other groups and other agencies. That seems to me to mark the termination of the work which I came to Washington to do and is hence an occasion on which I submit my resignation.
>
> In this last official document, I want to express to you, to the other administrative officers, and to the

Commissioners and Chairman of the Federal Communications Commission my warm appreciation for the intelligent and courageous support which they gave to the war effort, to the FBIS, to our division, and to me personally. I am glad to have had a little part in what I believe was a helpful war service, but I shall treasure as the most valuable part of my Washington experience, the friends I have made here and the opportunity to work along with my fellow officials in the Federal Communications Commission.

Cordially yours,

(s) Goodwin Watson.
GOODWIN WATSON.

On May 3, 1944, Mr. Leigh replied as follows:

DEAR GOODWIN: I have your letter of May 2nd presenting your resignation as Chief of the Analysis Division of the Foreign Broadcast Intelligence Service.

It is true that the position which you held and which was kept vacant for you has been eliminated, so that there is no practical reason for continuance of you on the rolls of the FCC. Your resignation coming in this way makes it very clear cut that the act is voluntary.

From the point of view of good governmental operation in the prosecution of the war effort, I would like to frame your resignation with double black edges—the first line would represent the detriment to the analysis work by your enforced leave of absence due to the act of Congress. The second would represent the hindrance to the war effort by the reduction in the FBIS appropriation.

Sincerely yours,

(s) ROBERT D. LEIGH, *Director*.

On May 24, 1944, plaintiff received a notification from the Director of Personnel of the Federal Communications Commission that his resignation had become effective on May 21, 1944.

4. The Federal Communications Commission has general supervision and control over the agency which it heads. It has the power of appointment of various of the officers and employees necessary in the execution of its functions, as provided in the Communications Act of 1934, including the power of appointment of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Commission and as such T. J. Slowie, or someone acting on his behalf, is

authorized to approve before presentation for payment itemized vouchers for all expenditures of the Commission which may be necessary for the execution of its functions, including compensation to plaintiff, as provided by the Communications Act of 1934.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These Rules were first published in the Congressional Record of June 2, 1943 (Congressional Record, 78th Congress, 1st Session, Appendix, p. 2962). The Sub-Committee conducted hearings from April 9 to April 15, 1943, to investigate certain charges made *inter alia*, against plaintiff. The hearings before the Sub-Committee were held in executive session. Plaintiff was invited to appear by letter dated April 7, 1943, as follows:

> DEAR DOCTOR WATSON: In accordance with H. Res. 105, 78th Congress, 1st Session, a copy of which is enclosed, the special subcommittee appointed thereunder has before it files from the Committee on Un-American Activities, the United States Civil Service Commission, the Federal Bureau of Investigation, and the Federal Communications Commission relative to your qualifications and suitability as a federal employee.
>
> The committee will examine these files beginning Friday, April 9, 1943, at 10 a. m. and you are instructed to appear at room 449 Old House Office Building at such time when opportunity will be afforded you to answer these charges and interrogations by the committee.
>
> A statement and list of the charges preferred against you before this committee by the Committee on Un-American Activities, House of Representatives, is immediately available for your inspection at the office of this committee.
>
> Very truly yours,
>
> (s) JOHN H. KERR,
> *Chairman, Special Subcommittee.*

Plaintiff's reply, addressed to the Chairman of the Sub-Committee, and dated April 8, 1943, was as follows:

> GENTLEMEN: Thank you for your invitation to appear and make a statement before the Kerr Committee.

I have the highest respect for this committee and welcome an opportunity for a thorough and judicial review of my case.

I have prepared the accompanying statement of what seem to me the most relevant facts. With your permission, I should like to present this statement to the committee, and I shall then be glad to answer any questions.

Yours respectfully,

(s) GOODWIN WATSON,
Chief, Analysis Division.

The letter of April 7, 1943, advised plaintiff that if he was unacquainted with the charges and allegations concerning him, a copy would be furnished upon request. No such request was made by plaintiff. Plaintiff was shown at the hearing 29 charges made against him by the Committee on Un-American Activities of the House of Representatives, 78th Congress, 1st Session, acting pursuant to H. R. 282. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others which were considered by the Sub-Committee in connection with plaintiff's case were and are confidential, except that the charges formulated by the Committee on Un-American Activities were shown to plaintiff at the hearing. The general counsel of the Federal Communications Commission appeared at the first session of the Sub-Committee with the first person summoned before it and requested permission to appear as an observer for the Federal Communications Commission, but was advised by the Sub-Committee that it had decided to hold its hearings without any persons other than the Sub-Committee, its staff, and the witness being present. The general counsel thereupon withdrew. Plaintiff was not proffered nor did he request the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff. No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to

his membership and activity in various organizations and with respect to various writings, speeches, and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation. Plaintiff registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

6. On April 21, 1943, the Special Sub-Committee of the Committee on Appropriations reported to the Committee on Appropriations. On April 26, 1943, the Federal Communications Commission, having considered the report of the Special Sub-Committee, concluded that it would retain plaintiff in its employment and issued a report thereon. On May 14, 1943, the Committee on Appropriations submitted a report (H. R. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714). Section 304 of the Urgent Deficiency Appropriation Act of 1943 of July 12, 1943, as finally enacted (Public 132), provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

The President did not appoint plaintiff under Section 304.

7. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he

acts as certifying officer for the Commission, wrote the following letter to the plaintiff:

> DEAR MR. WATSON: The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $6,500 per annum, your compensation for this pay period, with overtime, would ordinarily be $297.01. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.
>
> Section 304 of Public Law 132, 78th Congress, provides as follows:
>
> * * * * *
>
> Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943 and your compensation for this period with overtime is $178.21. Accordingly, after adjustment of tax deduction $23.60 and retirement deduction $8.13, there is enclosed a check for $146.68.
>
> If you desire to avail yourself of the benefits of the proviso which preserves your right to receive compensation for annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.
>
> Very truly yours,
>
> (s) T. J. Slowie,
> T. J. SLOWIE, *Secretary.*

Plaintiff demanded that he be paid for the services rendered to the United States as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, from November 16, 1943 through November 21, 1943. This demand was refused. Plaintiff was given no instructions by the Commission to cease working on November 15, 1943. The Commission permitted plaintiff to remain at his desk as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, from November 15, 1943, to November 21, 1943.

8. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has not received compensation from November 16, 1943 through November 21, 1943, nor has plaintiff ever received his pro rata annual base

salary plus overtime, or any part thereof, for the services rendered during that period. The defendant, acting through the Federal Communications Commission, its agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay plaintiff any compensation for the period from November 16, 1943 through November 21, 1943, nor has the defendant ever paid plaintiff his pro rata base salary plus overtime, or any part thereof, for services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $101.78.

No. 46028. *William E. Dodd, Jr.* v. *The United States.*

1. Plaintiff, William E. Dodd, Jr., is a citizen of the United States and at the time of the filing of this suit was a resident of Arlington, Virginia.

2. Plaintiff was appointed Editorial Assistant, Foreign Broadcast Intelligence Service, Federal Communications Commission, on December 1, 1941, by the Federal Communications Commission in the exercise of its authority to appoint such employees granted by Section 4 of the Federal Communications Act of 1934. Plaintiff took the oath of office on December 1, 1941. On December 22, 1942, plaintiff was appointed Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, by the Commission pursuant to said authority.

3. Plaintiff has performed the duties incident to the respective positions of Editorial Assistant and Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, from December 1, 1941, through November 21, 1943. The compensation for the position of Assistant News Editor is fixed at a base rate of $3,200 per year, plus overtime computed in accordance with the War Overtime Pay Act of 1943. Since November 21, 1943, plaintiff has been on a leave-without-pay status at the

Federal Communications Commission, and is in that status at the present time.

4. The Federal Communications Commission has general supervision and control over the independent agency which it heads. It has the power of appointment of various of the officers and employees necessary in the execution of its functions, as provided in the Communications Act of 1934, including the power of appointment of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Commission and as such T. J. Slowie, or someone acting on his behalf, is authorized to approve before presentation for payment itemized vouchers for all expenditures of the Commission which may be necessary for the execution of its functions, including compensation to plaintiff, as provided by the Communications Act of 1934.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These Rules were first published in the Congressional Record of June 2, 1943 (Congressional Record, 78th Congress, 1st Session, Appendix, p. 2962). The Sub-Committee conducted hearings from April 9 to April 15, 1943, to investigate certain charges made, *inter alia*, against plaintiff. Plaintiff was invited by letter to appear in person before the Sub-Committee and make such statements or explanations under oath as he might desire, and to answer such questions as might be propounded. The plaintiff requested the Clerk of the Sub-Committee to exhibit to him any charges against him, and was advised by the Clerk that the Sub-Committee had formulated no charges. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others, which were considered by the Sub-Committee in connection with plaintiff's case, were and are confidential, except for the testimony of plaintiff before said Committee. The general counsel of the Federal Communications Commission appeared at the first session of the Sub-Committee with the first person summoned before it and re-

quested permission to appear as an observer for the Federal Communications Commission, but was advised by the Sub-Committee that it had decided to hold its hearings without any persons other than the Sub-Committee, its staff and the witness being present. The general counsel thereupon withdrew. Plaintiff was not proffered nor did he request the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff. No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to his membership and activity in various organizations and with respect to various writings, speeches and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation. At the close of the hearing, plaintiff was also accorded an opportunity to make any statements he wished, but registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

6. On April 21, 1943, the Special Sub-Committee of the Committee on Appropriations reported to the Committee on Appropriations. On April 26, 1943, the Federal Communications Commission, having considered the report of the Special Sub-Committee, concluded that it would retain plaintiff in its employment and issued a report thereon. On May 14, 1943, the Committee on Appropriations submitted a report (H. Rep. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee, and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714).

Section 304 of the Urgent Deficiency Appropriation Act of 1943, of July 12, 1943, as finally enacted (Public 132), provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any

> department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, that this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

The President did not appoint plaintiff under Section 304.

7. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as the certifying officer of the Commission, wrote the following letter to the plaintiff:

> DEAR MR. DODD: The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $3,200 per annum, your compensation for this pay period, with overtime, would ordinarily be $159.51. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.
>
> Section 304 of Public Law 132, 78th Congress, provides as follows:
>
> * * * * *
>
> Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943, and your compensation for this period with overtime is $96.51. Accordingly, after adjustment of tax deduction $5.00 and retirement deduction $4.00, there is enclosed a check for $87.51.
>
> If you desire to avail yourself of the benefits of the proviso which preserves your right to receive compensation for annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.
>
> Very truly yours,
>
> (s) T. J. SLOWIE, *Secretary*.

Plaintiff demanded that he be paid for the services rendered to the United States as Assistant News Editor, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused. Plaintiff was given no instructions by the Commission to cease working on November 15, 1943. The Commission permitted plaintiff to remain at his desk as Assistant News Editor, Foreign Broadcast Intelligence Service, from November 15, 1943, to November 21, 1943.

8. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has not received compensation from November 16, 1943, through November 21, 1943, nor has plaintiff ever received his pro rata annual base salary plus overtime, or any part thereof, for the services rendered during that period. The defendant, acting through the Federal Communications Commission, its agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay plaintiff any compensation for the period from November 16, 1943, through November 21, 1943, nor has the defendant ever paid plaintiff his pro rata base salary plus overtime, or any part thereof, for services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $59.83.

The court decided that the plaintiffs were entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

On August 26, 1943, plaintiff Robert Morss Lovett was appointed Executive Assistant to the Governor of the Virgin Islands by the Secretary of the Interior, pursuant to authority granted in Section 23 of the Organic Act of the Virgin Islands of the United States, approved June 22, 1936, 49 Stat. 1807, 1813. He took the oath of office and entered upon the duties

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thereof October 12, 1943. He performed them thereafter through March 13, 1944, at which time his services ended. He has not been paid the salary of his office for the period November 15, 1943, through March 13, 1944, which amounts to $1,996.40, and this sum he sues to recover.

Plaintiff Goodwin B. Watson was appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, November 16, 1941, by the Federal Communications Commission, and took the oath of office and entered upon the duties thereof on that date, and performed them thereafter through November 21, 1943, when his active services ended. His appointment was made under Section 4 of the Communications Act of 1934, approved June 19, 1934, 48 Stat. 1064, 1066. He sues to recover the salary of his office from November 16, 1943, through November 21, 1943, amounting to $101.78, which he has not been paid.

Plaintiff William E. Dodd, Jr., was appointed Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, December 22, 1942, by the Federal Communications Commission, under Section 4 of the Communications Act of 1934, immediately entering upon the duties of that office. He performed those duties thereafter through November 21, 1943. He has not been paid the salary attached to that office for the period from November 16, 1943, through November 21, 1943, which amounts to $59.83, and he sues herein for that amount.

None of the appointments here involved were made by the President of the United States and confirmed by the Senate.

The three cases have been submitted on stipulations, and they have been briefed and argued together. The general question raised has been the constitutionality of Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450.

The plaintiffs assert that the section is unconstitutional, setting forth their reasons for that assertion. The Attorney General having heretofore also taken the position that the section was unconstitutional, and still adhering to that position, the Assistant Attorney General, appearing for the defendant, supports the plaintiffs. Special counsel appear in the cases as *amici curiae*, having been employed to defend

the constitutionality of the disputed section. The special counsel are designated variously in the record as representing the House, the Congress, the United States. Their brief is entitled "Brief for the Congress of the United States," and they sign as "Special Counsel for the Congress of the United States." They will hereinafter be referred to as "special counsel."

Insofar as the law involved in these three cases is concerned, they are not to be distinguished one from the other.

Special counsel raise the question of jurisdiction. Section 145 of the Judicial Code governs. The general jurisdiction of this Court in pay cases is too well-known and established to justify re-examination. Section 304, which will be quoted verbatim, in no way indicates that this Court is without jurisdiction. There is not a line or word to that effect. Inferences will not be employed to go to the extent of holding that Congress went so far as to deny these plaintiffs their day in court. The jurisdictional statute is general, and Section 304 contains no exception.

Section 304 is as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

If Section 304 is unconstitutional and of no effect, recovery follows. Special counsel argue that it is not sever-

able. Their argument is not convincing. We are in no doubt about our jurisdiction.

If, on the other hand, Section 304 is a valid exercise of constitutional power, but notwithstanding that plaintiffs are entitled to recover, then it becomes a matter of indifference whether the section is valid or invalid as an exercise of constitutional power.

The Court will not reach out gratuitously to avail itself of questionable but inapplicable elements in an act and thereby hold it to be unconstitutional. There is always the presumption of validity. The Court will not undertake to say that, because provisions in Section 304, not here operative, are invalid, the whole of the section falls for invalidity.

Much of the argument presented seems to be based on a supposed lack of appropriation. But there was an appropriation. Section 304 refers to an actual appropriation, an "available" appropriation. If "available", the appropriation, as far as these cases are concerned, was available for the payment of these salaries. Availability of the appropriation for other purposes is beside the question. The disbursing agency could divert no part of an appropriation to purposes other than those for which that appropriation was made. Section 304 does not say "otherwise" available, and important words may not be put into the statute that Congress did not place there. There was an appropriation, it was available for the payment of these salaries. If it was not available for the payment of these salaries, then it was clearly not "available" to the administrative bureau. Congress did not limit the appropriation. What it did limit and what it was directed to, was the activities of the disbursing agency. There, and there only, did Congress apply the brake.

Section 304 is notable for what it did not do, as well as for what it did do.

It did not terminate plaintiffs' services. Special counsel insist that it did not work removal from office, and so stated on argument of the cases.

Removal from office is not made an item of damages here. The claim made is only for salary of the office during the time of service, and no longer. We are therefore not con-

cerned with the cause of termination, or in what situation, except for lack of pay, the plaintiffs found themselves thereafter.

This limitation upon the claims made explains why it has not been necessary in reviewing the facts, to gather in many things that are of record, or of which judicial notice may be taken. Many of the circumstances are interesting only, and in no sense material to disposition of the cases.

There is nothing in Section 304 which disturbed plaintiffs' incumbency in office. Special counsel in their brief say:

> All that the statute did was to say to the disbursing officers of the Government: After November 15, 1943, you shall not pay out any money to Watson, Dodd and Lovett unless prior to that date they have been appointed by the President and confirmed by the Senate. This was merely a direction to disbursing officers, and in itself created no legal rights in anyone.

We repeat, the Court, in passing upon the constitutional validity of a statute will not gratuitously reach out to make use of that which is irrelevant to the case in hand. It was said in *Watson* v. *Buck*, 313 U. S. 387, 402:

> A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.

Section 304 does comprehend more than a direction not to pay for the isolated services here rendered. But that "more" is here irrelevant. In terms the section extends to all available appropriations, all disbursing officers, all departments, agencies or instrumentalities of the United States, all personal services of the instant plaintiffs, and is without limitation in time. But in the cases before us we have for consideration only one specified period of employment, and the conditions of that specific employment. We cannot introduce situations which are not before us, and which may indeed never come into being. It may be re-

peated, that here we have no claim for damages for removal from office, no petition for compulsory process, solely a claim for the as yet unpaid salary of an office, the duties of which have been performed by the undisputed holder of that office. These are not suits for reinstatement to office. As was said in *California* v. *San Pablo etc. Railroad*, 149 U. S. 308, 314:

> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

The incumbent of the office held it *de jure*. There was no irregularity in the appointment. There was no removal of the officer from the office, no removal of the salary from the office. The appropriation was made and designated as "available." The only appropriation here, *in praesenti*, is the appropriation available to pay these salaries.

The closer the statute is examined, the more clearly does it appear that with reference to the particular situation we have here, Congress confined itself to one thing—prohibiting the disbursing agencies from paying the salaries of the plaintiffs. The Act is very carefully framed to avoid denying pecuniary obligations. It is a bare caveat issued against the disbursing agency.

As special counsel contend, Congress did not remove from office. The original appointment was unaffected, the office was undisturbed, the compensation was unchanged, the incumbents were not separated from office. They held *de jure*.

Quoting again from the brief of special counsel:

> Section 304 did not deprive plaintiffs of any right to salary. Section 304 denied to the Federal Com-

munications Commission and to the Secretary of the Interior the funds with which to pay plaintiffs: and since under 47 U. S. C., Sec. 154 g and 48 U. S. C., Sec. 1405 v, the power of those agencies to grant plaintiffs a right to salary depended upon the existence of such funds, Section 304 prevented these agencies from granting the right plaintiffs assert.

We are not free to conclude that Section 304 accomplished deviously that which for certainty's sake should have been accomplished directly, if it could be accomplished at all. What it did do directly, not indirectly, constitutionally or unconstitutionally, and nothing more, was to stay the hand of the disbursing agency.

There would have been no occasion for Section 304 to stop payment if the plaintiffs were not holding their respective offices in fact and in law. No disbursing agent had authority to make payment of salaries to men out of office or not entitled to office, and a direction to such an agent not to pay the salary to a legally displaced officeholder would have been something less than an empty gesture. The obvious circumstance that the section was dealing with was one where the plaintiffs were legally and actually in office. Section 304 did not remove them.

It is to no very useful purpose to inquire into the reason for enactment of Section 304. But, it may be remarked in passing, that it is impossible to conclude that Congress meant that in the final outcome, service was to be free to the Government, because the plaintiffs were, in its opinion let us say, unfit for office. It is plain that the plaintiffs, if unfit, were just as unfit serving the Government for nothing, as serving it for something. There is no logic to the proposition that the plaintiffs were to serve the Government for nothing. The proposition is irrational. Unfitness could not be converted into fitness by withholding salary. Yet the statute allowed these plaintiffs to continue in office.

Section 304 is not to be construed beyond its express, explicit terms, nor beyond its incidence in time. It effectually halted the disbursing process in a special situation, at a particular time. We are not here concerned with other situations, other times. The situation, the occasion, has now passed into history. The accomplished event is not now before the Con-

gress and never has been. But it is here and now before this Court.

It is urged that plaintiffs must fail, because the procedure was not followed of having an appointment "by the President, by and with the advice and consent of the Senate," as provided for in Section 304. It has been observed that Section 304 is notable for what it does not say. It does not say that the services of the plaintiffs are terminated, that they shall not continue on under their current appointments. In other words, as special counsel observe, the section did not remove them from office. The plaintiffs did not have to have a presidential appointment in order to continue in office. They did continue in office. It is only the period of their continuance in office, after November 15, 1943, that is involved in this controversy.

In a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due. *King* v. *United States*, 1 C. Cls. 38; *Graham* v. *United States*, 1 C. Cls. 380; *Curtis* v. *United States*, 2 C. Cls. 144; *Grant* v. *United States*, 5 C. Cls. 71; *Collins* v. *United States*, 15 C. Cls. 22; *Briggs* v. *United States*, 15 C. Cls. 48; *Parsons* v. *United States*, 15 C. Cls. 246; *Huffman* v. *United States*, 17 C. Cls. 55; *Dougherty* v. *United States*, 18 C. Cls. 496; *Ferris* v. *United States*, 27 C. Cls. 542; *Sherlock* v. *United States*, 43 C. Cls. 161; *Strong* v. *United States*, 60 C. Cls. 627; *Danford* v. *United States*, 62 C. Cls. 285; *McNeil* v. *United States*, 64 C. Cls. 406; *Cogswell* v. *United States*, 68 C. Cls. 694; *Palmer* v. *United States*, 69 C. Cls. 260; *Crist* v. *United States*, 74 C. Cls. 283; *Conrad* v. *United States*, 74 C. Cls. 289; *Wilson* v. *United States*, 77 C. Cls. 630; *Leonard* v. *United States*, 80 C. Cls. 147; *Miller* v. *United States*, 86 C. Cls. 609; *United States* v. *Langston*, 118 U. S. 389; *United States* v. *Vulte*, 233 U. S. 509.

The provision in Section 304 that no available appropriation shall be used to pay the salaries of these plaintiffs, here in question, does not reach to this Court. Speaking with reference to the constitutional provision that no money shall be drawn from the Treasury but in consequence of

appropriations made by law, this Court said (*Collins* v. *United States*, *supra*):

> That provision of the Constitution is exclusively a direction to the officers of the Treasury, who are intrusted with the safekeeping and payment out of the public money, and not to the courts of law; the courts and their officers can make no payment from the Treasury under any circumstances.
>
> This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress, or the regulations of the executive departments.

Section 304 made no pretense to determine a legal liability. It assumed no judicial function. It simply prevented a particular disbursement from a particular fund, no more than that if it be taken for just what it says, without inferences. We are confining ourselves, of course, to the precise claims asserted.

In *United States* v. *Dickerson*, 310 U. S. 554, it was held that an appropriation act could suspend the operation of a prior statute granting certain reenlistment allowances. Granted that an appropriation act may be something more than an accounting process, in the case we have here Section 304 makes no attempt to change or do away with compensation attached to the offices held by the plaintiffs. It merely stopped payment in three specific instances (no other instances are here involved), regardless of obligation.

The obligation was undisturbed. The Act did not say it was destroyed, or even subtly attempt to destroy it, unless we are to indulge in inferences, which we are not disposed to do. It did not say to the plaintiffs: "You are discharged." The status of the plaintiffs was untouched.

The cases cited indicate survival of the obligation in spite of lapse, exhaustion, failure of appropriation. Other reported cases not pay cases, are crowded with instances of unliquidated damages recovered, recovery against the United States being had in the absence of any appropriation at all to pay unliquidated damages, and in the absence of any authority in the disbursing agency to satisfy the litigant's claim.

In the three cases now here considered there was more than in the cases cited. There were in existence "available" appropriations. As heretofore indicated, full value must be given to the express word "available." It can not be changed to "unavailable." If the appropriations could not be used for these offices, then they were unavailable. The statute says they are available, and they must be so considered.

We have pointed out that Section 304 was without time limitation. Congress can not bind itself to discontinue legislation, if it is to go on as a constitutional body. It may therefore repeal Section 304. Section 304 is statutory, not a part of the Constitution. It may or may not turn out to be permanent legislation.

Congress, by enacting Section 304, did not foreclose itself from thereafter appropriating for the payment of these salaries. Congress even now may appropriate, and authorize a selected disbursing agency to pay them. Claims therefor, presented to Congress, may be satisfied by an appropriation to pay them, as claims. Judgments, recovered here, may be satisfied by any appropriation out of which the judgments may be by Act of Congress, payable.

The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit plaintiffs from receiving their salaries. The Act did provide an appropriation for the payment of their salaries. The appropriation for the pay period was there, but it was not made use of. The plaintiffs were appointed lawfully, they continued in office lawfully. Section 304 is no way disqualified them, and we can find no rational basis for construing the Act otherwise than as a mere stoppage of disbursing routine, nothing more. To construe it as something more is to volunteer inferences. Whether the Congress had the constitutional authority to stop payment, within the limitations of the Act, is immaterial. That which is material is that the salaries have not been paid, that the obligation was never destroyed, and that the obligation continues to this day.

In the conclusion arrived at, it is immaterial whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, or any part thereof, is constitutional or not. We do not de-

cide that question. The plaintiffs are entitled to recover in either event. As previously indicated, consideration of Section 304 is necessarily confined to narrow limits, as narrow as the claims themselves.

Plaintiff Robert Morss Lovett in case No. 46026 is entitled to recover $1,996.40; plaintiff Goodwin B. Watson in case No. 46027 is entitled to recover $101.78; and plaintiff William E. Dodd, Jr., in case No. 46028, is entitled to recover $59.83. Judgments will be entered accordingly. It is so ordered.

LITTLETON, *Judge*, concurs.

WHITAKER, *Judge*, concurring:

I desire to state very briefly the reason for my concurrence in the result reached by the court.

In the brief filed for the Congress it is argued that the power of that body to appropriate money is without limitation and, hence, that it can attach any condition it pleases on the use of the money appropriated. Even if we accept this statement without limitation, still, section 304 goes much beyond a mere restriction on the use of the money appropriated by that Act. It not only prohibits the use of the money thereby appropriated to pay plaintiffs' salaries, but it also prohibits the use of any money theretofore or thereafter to be appropriated to pay their salaries, either in their present positions or in any other governmental positions, except as jurors or members of the armed forces. This amounts to depriving plaintiffs of their rights as citizens to enjoy the emoluments of office. It is, therefore, an Act inflicting punishment upon them without a judicial trial.

The passage of such an Act is prohibited by clause 3 of section 9 of Article I of the Constitution, which reads: "No bill of attainder or ex post facto law shall be passed." A bill of attainder has been defined by the Supreme Court as "a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings* v. *Missouri*, 4 Wallace 277, 323.

I have no doubt that section 304 of this appropriation Act violates this provision of the Constitution; no judicial tribunal has found them guilty of any crime, but by this Act they have been denied the salary attached to any office they may now or hereafter occupy. Patently, this violates this provision of the Constitution. If it does, it is void, although it was enacted in the exercise of the power of Congress to appropriate money. The grant of any power by the Constitution is subject to the limitation that it must not be exercised in a way that would nullify another provision of the Constitution. See, for instance, *Marbury* v. *Madison*, 1 Cranch, 137; *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Knowlton* v. *Moore*, 178 U. S. 41; *Dick* v. *United States*, 208 U. S. 340.

Since I am convinced that this Act does violate this provision of the Constitution, I find it unnecessary to consider the other constitutional objections to it, to wit, whether it amounted to a removal of these men from office or a denial of due process of law.

Courts never take pleasure in saying that a coordinate branch of the Government has exceeded its constitutional powers; certainly in this case I take no pleasure in saying that Congress has done that which it had no power to do; but since I am convinced that the restriction amounts to a bill of attainder, I am under compulsion to say that the restriction is invalid and, hence, cannot operate to deprive these men of the salaries to which their positions entitle them.

JONES, *Judge*, concurring.

I concur in the result.

The single issue in this case is whether Section 304, as worded, is a valid exercise of the constitutional powers of the Congress.

The authority of the Congress to make appropriations, within the framework of the Constitution, is plenary. The power to make appropriations carries with it the power to withhold or deny appropriations. That power has been exercised for generations.

This is as fundamental as the ten commandments.

As to the wisdom of granting or withholding appropriations the courts have no right to pass judgment, granted, of course, that the Congress is acting within the scope of its authority.

The Congress has the sheer power to grant or withhold current appropriations to individuals except for services already rendered, regardless of whether the action taken is wise or unwise. It does not have to assign a reason for such action, and we have no right to ask for a reason.

A member's constituency alone, under our philosophy of government, has a right to call such member to account.

Having the power to appropriate for specified purposes it has the power to limit the use of such funds so long as it is merely a limitation.

If Section 304 merely forbade the use of funds in the bill, or other funds already available in other bills, I would have no hesitancy in holding it a limitation on appropriation.

The true issue is narrowed to whether the expression "or which is hereafter made available under or pursuant to any other act" transforms it from an appropriation to a legislative provision, and whether such legislation deprives plaintiffs of valuable rights as citizens which they would otherwise have under the Constitution.

The language quoted goes beyond a mere limitation on appropriation and becomes, unless affirmatively repealed, a permanent denial of plaintiffs' rights as citizens. A rose remains a rose even though someone calls it a lily.

No one has a right to be employed by the Government, but every citizen, whose rights have not been legally forfeited, is privileged to apply for any position within the Government and to have his application considered on its merits. This is a thing of value not only intrinsically, but because of the satisfaction it brings a man regardless of whether it is ever exercised. The knowledge of its possession is a powerful element in the pursuit of happiness. Section 304 forecloses this right and closes that door of opportunity.

The national government is one of delegated powers in all its branches. All powers not delegated remain with the states or with the people.

The tenth amendment is as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The ninth amendment is as follows:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The power to provide or deny appropriations is vested in the Congress. There is no other way to take money out of the Treasury. The Constitution provides (*Art. I, Sec. 9*)

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *.

If Section 304 were a mere denial of appropriation, however unjust it might be, it could not be successfully questioned. But it does not stop with a mere denial of appropriation. It goes far beyond this. It forbids on a permanent basis employment in the future. It thus becomes a permanent legislative ban.

I cannot find within the four corners of the Constitution any power lodged in the Congress to deny these privileges to any citizen, except in the manner prescribed in the Constitution.

The principle of equality was written in the Declaration of Independence before we had a constitution. It was the result of a long struggle of English peoples upward toward the plains of liberty. It is one of our proudest traditions. It was carried forward into the Constitution. It shines through almost every provision in that instrument. The Constitution provides for liberty, equality and fair play; and freedom from every form of new and old world caste and privilege, and from the tyranny of wealth and birth. It throws every safeguard around the rights and privileges of the individual citizen.

The right to seek employment is one of the most highly prized rights of the Anglo-Saxon race. When a citizen by his conduct forfeits any of his rights, privileges, and immunities, a method is provided for establishing that for-

feiture. That method was not pursued here. One of the chief glories of the Constitution is the fact that you cannot take the shirt from the back of a ragged street urchin without either securing the lad's consent or paying for the rags in the manner prescribed by law. The same is true of his privileges in every form. *Truax* v. *Raich*, 239 U. S. 33, 41; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370; *International News Service* v. *Associated Press*, 248 U. S. 215, 236.

Section 304 in making a permanent ban on the rights and privileges of the plaintiffs, exceeds the authority delegated to the Congress by the Constitution.

MADDEN, *Judge*, concurring in the result:

I agree with the decision of the court, but, because of the importance and variety of the problems presented, I make the following additional observations.

Nothing is claimed to have been done or said or written by any of the plaintiffs which was unlawful. No statute or legal doctrine is brought forward under which it is claimed that they could have been restrained before utterance or action, or punished thereafter by so much as a penny fine. And no indirect adverse legal consequences were attached to what they said or did by any legal doctrine, or by statutes such as the Hatch Act, or the various provisions in other acts disqualifying for Government employment members of organizations which advocate the overthrow of our constitutional form of government. It is not claimed that they violated those laws. In short, what they did was completely innocent and of no interest or consequence to the law of the land as it then was, or, as to all persons except the three plaintiffs, as the law still is. And this was true without any resort to constitutional protections of freedom of utterance or action. The law, wholly apart from the Constitution, did not touch what they had done. But as a consequence of their having done what they did, the three plaintiffs find themselves excommunicated, reduced to the status of three second-class citizens among all of the millions of their fellows. They find themselves subject to the same obligations as their fellow

first-class citizens to obey the laws, pay taxes, and serve in the armed forces and on juries; but completely and perpetually disqualified from serving their Government in any of the thousands of positions in which any of the rest of us, if technically capable, may serve. It is not claimed that the three plaintiffs were not competent to perform, or did not faithfully perform, the duties of the positions they held.

Has Congress the power to remove, by statute, named individuals from Government service, and make them perpetually ineligible to hold positions in Government service because they have engaged in conduct which was entirely lawful? Section 304 purports to do this. If it in fact accomplishes it, it has accomplished, under the guise of law, a shocking and outrageous injustice, unique in our history, and discouraging because it follows one hundred and fifty years of experience under the best Government men have devised. The court's problem is not, of course, whether Section 304 is unjust, but whether it is unconstitutional. But when the injustice of the particular law is so shocking, and the threat of its repetition and extension is so menacing to our institutions, as in the case of Section 304, one can hardly be blamed for saying to himself, even before he consults the text of the Constitution, "If the Constitution is the charter of liberty and free government which I have always supposed that it is, it does not permit this."

If Section 304 is valid, Congress can disqualify for public office or service racial minorities, political minorities, and, probably, religious minorities. To do so would, indeed, be less unjust than what is done by Section 304. If a racial minority were excommunicated, the statute would at least have one quality of what we have been accustomed to regard as law, the quality of generality of application to all persons of an ascertainable class. No individual would have the finger of the state pointed at him, as these three plaintiffs have, saying "You are degraded, not because of the kind of person you are, for there may be thousands of persons just like you in all essential respects, who are still full citizens; not because of what you have done, for there may be thousands of persons who have

done the same things, so far as those things are relevant to a rational state, as you have done. You are degraded because the state has selected you for degradation." And a racial or other minority could under the constitutional protections which would apply even to second-class citizens, pool their resources and agitate for the repeal of the statute with some slight hope that in the turn of political events a powerful party might need the votes of this minority to insure its success, and hence would espouse its cause. But three individuals, such as these plaintiffs, are helpless. If they speak, who will listen? If they should happen to have the money to publish, who will read? Their appeal would appear to be completely selfish. The reaction would be: "Who are these persons, of the dominant race, of many generations of honorable American ancestry, to be complaining of discrimination? I don't know just what has happened to them, but if they can't take care of themselves, nobody can." And nobody can, if Section 304 is valid.

Section 304 is asserted by the plaintiffs to be unconstitutional because (1) it purports to remove the plaintiffs from executive offices, and no power of removal resides in the legislative branch of the Government, except by impeachment; (2) it is a bill of attainder, or its equivalent, a bill of pains and penalties, which the Constitution forbids; and (3) it deprives the plaintiffs of liberty and property without due process of law, in violation of the Fifth Amendment.

I have no doubt that Section 304 is a bill of pains and penalties and is therefore unconstitutional. It has the ancient flavor of the bills of attainder which were so odious to the makers of our Constitution that they forbade such laws in the main body of the Constitution and before the bill of rights later embodied in the first ten amendments was thought necessary, in that it, like the bills of attainder that the fathers were familiar with, selects its victims as named individuals, and not as persons belonging to any describable class. It punishes them by removal from office and income and disqualification from ever again serving their Government for compensation except

in military or jury service. It thus imposes the same penalty which the Senate is authorized to impose, on conviction by a two-thirds vote after impeachment by the House, upon officers guilty of "treason, bribery, or other high crimes and misdemeanors." The question of whether the forfeiture of the right to pursue a public calling was punishment, so that a statute imposing it for past innocent conduct is an *ex post facto* law and a bill of pains and penalties was settled right in the cases of Cummings, the priest, 4 Wall. 277, and Garland, the lawyer, 4 Wall. 333.

I think Section 304 violates the Fifth Amendment in that it attempts to deprive the plaintiffs of liberty and property without due process of law. I recognize that the Fifth Amendment does not, like the Fourteenth, which applies only to state governmental action, expressly assure equal protection of federal laws. But a statute which selects persons for punitive action on a completely personal basis, with no attempt to treat similarly other persons similarly situated, is so foreign to our concepts of law that it is difficult to think of it as law at all, though it bears the stamp of legislative enactment. If a legislature refuses to define the conduct which it desires to punish, if done by A, in such terms that B and C and D and will be equally punishable if they do it, but instead merely provides that A shall be punished if he does it, the legislature engages, not in law making, but in arbitrary action. And this would be true, even if the statute did not, as Section 304 does, attempt to make punishable conduct which was wholly innocent when engaged in. There are indications in opinions of the courts, though the necessity for deciding the questions has not hitherto arisen, that the due process of law which is required by the Fifth Amendment would not be satisfied by the arbitrary selection by the legislature of certain named individuals to be the sole victims of penal laws. In *Hurtado* v. *California*, 110 U. S. 516, 535, where the arbitrary action of a state was in question, the court said:

> But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and

indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, * * *

The cases of *Nichols* v. *Coolidge*, 274 U. S. 531; *Wallace* v. *Currin*, C. C. A. 4, 95 F. (2d) 856; *Minski* v. *United States*, C. C. A. 6, 131 F. (2d) 614; *United States* v. *Ballard*, W. D. Ky., 12 F. Supp. 321, also indicate the same attitude toward governmental action in the guise of law which penalizes persons unequally. I think, therefore, that Section 304 is forbidden by the Fifth Amendment.

It is urged that Section 304, even if it would otherwise be invalid as a trespass by Congress upon the executive function of removal of executive officers, is saved by the provision that these plaintiffs might keep their positions if, within the period of a few months set by the statute, they were appointed by the President and confirmed by the Senate. But no other person in the country had to pursue such a course in order to obtain or hold those positions, or identical or comparable ones. The requirement was intended to be, and was, discriminatory and oppressive as to three selected individuals out of all the people in the country. Under a system of equal justice under law, the three plaintiffs should not be subjected, in order to get or hold a Government position, to any other or different requirements than the rest of us are subject to. And the Constitution, I think, forbids their being so oppressed.

It is, in effect, urged that even though Section 304 is unconstitutional for any or all of the reasons suggested, there can be no relief for its victims because the Section is a part of an Appropriation Act, and the power of Congress to control expenditures is absolute. It may well be that under our Constitution, and under any constitution which might be devised for a free people, one branch of the Government could, temporarily at least, subvert the Government. The Judges might refuse to enforce legal rights or convict criminals. The President might order the Army and Navy to surrender to the enemy. Congress might refuse to raise or appropriate money to pay the President or the Justices of the

Supreme Court and the other courts. But any of these imagined actions would not be taken pursuant to the Constitution, but would be acts of subversion and revolution, the exercise of mere physical power, not lawful authority. And conduct by any branch of the Government less ruinously subversive, but, so far as it goes, equally unconstitutional, is likewise an exercise of physical power rather than lawful authority. I do not think, therefore, that the power of the purse may be constitutionally exercised to produce an unconstitutional result such as a taking of a citizen's liberty or property without due process of law, a conviction and punishment of a citizen for wholly innocent conduct, or a trespass upon the constitutional functions of another branch of the Government. And to whatever extent it is within the jurisdiction of a court to which the question is presented in litigation, to give judgment according to the Constitution, even though that requires the court to disregard a statute which conflicts with the Constitution, the judges are bound by their oaths to give such a judgment. In this case, therefore, we must disregard Section 304. Without it, the plaintiffs are in the position of having performed services for the Government, under lawful appointments, for which the Government has refused to pay. Each of them is, therefore, entitled to a judgment.

C. J. MANEY COMPANY, INC., AND NEW ENGLAND FOUNDATION CO., INC., *v.* THE UNITED STATES

[No. 45048. Decided November 5, 1945]

On the Proofs

Government contract; contractor not entitled to recover extra expense incurred for more expensive paint made necessary because concrete surface did not meet specifications.—Where the plaintiffs, contractors for a Government housing project, failed to provide the concrete surface required by the specifications; and where a more expensive paint was used instead of preparing the concrete surfaces in order to meet the requirements of the specifications; it is *held* that plaintiffs are not entitled to recover the extra cost of the paint used.

The Reporter's statement of the case:

Mr. Dean Hill Stanley for plaintiffs. *Mr. Joseph R. McCuen* was on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs, C. J. Maney Co., Inc., and New England Foundation Co., Inc., are corporations organized and existing under the laws of Massachusetts, the former having its principal place of business at Somerville, Massachusetts, and the latter having its principal place of business at Boston, Massachusetts.

2. On August 4, 1936, the plaintiffs entered into a contract with the defendant, the latter represented by the Assistant Federal Emergency Administrator of Public Works as its contracting officer, whereby the plaintiffs agreed to furnish all labor and materials and perform all work required for the construction of the superstructure for Fairfield Court Housing Project, No. H–9601, at Stamford, Connecticut, for the consideration of $690,956.00. The contract provided that the work should be performed in strict accordance with the specifications, schedules, and drawings, which were made a part of the contract, and that the work should be commenced upon receipt by the plaintiffs of notice to proceed, and that the work should be completed within 250 calendar days from the date of the receipt of notice. The superstructures to be constructed consisted of three buildings of three stories each and five rows of houses of two stories each.

3. Notice was given by defendant and received by plaintiffs fixing the commencement day as August 13, 1936, and the completion day as April 19, 1937. Change orders, not involved in this suit, extended the completion date 123 calendar days. Plaintiffs completed the work on August 19, 1937, which was within the contract time as extended by the change orders. However, the work involved in the change orders did not actually delay the final completion of the contract more than about 53 days.

4. Under the terms of the contract, the surface of the ceilings in the various rooms of the buildings was the under-surface of the concrete slabs which divided the buildings into stories. This under-surface of the slabs which constituted the ceilings in the various rooms was not to be plastered but was to be painted.

5. The specifications relative to concrete work and forms provided *inter alia* as follows:

> 1. Forms shall conform to the lines, dimensions, and shapes indicated on the drawings for the member for which provided. They shall be tight to prevent leakage of concrete and shall be securely braced and maintained in position to prevent any possibility of movement after the concrete is poured and insure safety to workmen and passersby.
>
> * * * * *
>
> 4. Forms may be either lined or unlined but shall produce the following surfaces:
>
> (A) Exterior concrete surfaces exposed to view, interior exposed concrete surfaces in spaces where glazed finish tile or brick occurs, and interior exposed concrete surfaces in spaces where plastered walls occur (see Div. "Plastering") shall be level and smooth to receive paint. The external angles of concrete beams and columns in these spaces which are not plastered shall be bevelled, the bevel being formed of smooth-grained wood strips.
>
> (a) The material used for form work shall produce a level, dense surface, free from honeycombing, joint marks, fins, bulges, depressions, or marks showing the grain of the wood forms. The requirement for level ceilings shall be construed to mean a ceiling in which the surface shall not vary from the level more than ¼ inch in 10 feet.
>
> (b) Any defects that may appear shall be rubbed smooth with carborundum stone, or by other means if necessary, until the surfaces meet with the approval of the Contracting Officer.
>
> (B) All exposed interior concrete surfaces, except in spaces where plastered walls occur and except in spaces indicated on the drawings as "Pipe Spaces" shall be free from fins, and honeycombing and equal in all respects to surfaces produced by use of surfaced lumber forms.
>
> (C) All other surfaces of concrete work shall be equal to that produced by use of rough lumber forms. Fins

and other surface defects need not be remedied, subject to the approval of the Contracting Officer.

6. The specifications relative to paint and painting contained a schedule in part as follows:

Surface and Items	Number and Kind of Coats Required		
	First Coat, Formula No.	Second Coat, Formula No.	Third Coat, Formula No.
Interior Plaster, Concrete, and Fiber Board:			
Finished plaster surfaces, except as otherwise noted.	9A or 9B	10 or 11	10 or 11.
Exposed concrete surfaces in spaces where finished plaster occurs (except as otherwise noted).	9A or 9B	10, 10A, or 11	10, 10A, or 11.
Exposed concrete surfaces in stair halls of Apartment Buildings (except floors, stair treads, and landings).	9A or 9B	10, 10A, or 11	10, 10A, or 11.
Utility room, walls, and ceilings	9A or 9B	3, 15, or 16	3, 15, or 16.
Kitchen and Toilet Room walls and ceilings.	9A or 9B	3, 15, or 16	3, 15, or 16.
Bathroom walls and ceilings (except fiber board).	9A or 9B	3, 15, or 16	3, 15, or 16.
Fiber board ceilings	13	3, 15, or 16	5.
Keene's cement wainscots and Portland cement bases. (See specification for plastering.) Note.—Include fourth coat of Formula No. 5.	9A or 9B	3, 15, or 16	3, 15, or 16.
Cement floors in Laundries	14	----------	

The specifications then provided under general notes supplementary to the schedule as follows:

> 6. If Formula No. 10 is used, the Plaster Primer (Formula Nos. 9A or 9B) may be omitted. If Formula Nos. 10A or 11 are used, the Plaster Primer (Formula Nos. 9A or 9B) may be omitted at the Contractor's option, but if so omitted the Contractor will be held responsible for lime burns or other blemishes that may show through the paint and he shall remedy same at his own expense to the entire satisfaction of the Contracting Officer.
>
> * * * * *
>
> 10. Where painting of concrete surfaces is required, and where in pursuance to the Concrete specification the concrete has been rubbed or patched to eliminate irregularities, the paint shall be so applied as to render the rubbed or patched surfaces the same in appearance as untouched surfaces. This shall include stippling if necessary.

Plaintiffs elected to use Formula 11.

7. The concrete slabs, the lower surfaces of which constituted the ceilings of the rooms, were completed and the forms stripped therefrom about the middle of February 1937, and on February 19, 1937, the defendant's project engineer, J. M. Curley, wrote plaintiffs a letter in part as follows:

> In regard to the ceilings, as you are aware, there are a great many irregularities and imperfections which, in the writer's opinion, must be removed before the paint is applied. These irregularities and imperfections, as you are aware, become more pronounced and visible when the paint is applied to the ceilings, as you will note in Building "D-1" where a sample of the paint has been applied.
>
> In connection with this matter of painting the finished concrete surfaces it would be well to refer again to page 71, Section 8, describing the forms, wherein it is pointed out the extreme care which must be exercised in the selection of materials and in the erection of the forms so that the exposed concrete surfaces would be level and smooth to receive paint; and, of course, the painting specifications on page 164, Section 3, paragraphs 6 and 10 augment the foregoing concrete specifications concerning forms to require a uniform, desirable and acceptable finish on these ceilings.
>
> In view of the fact that your painter has expressed the intention to use Formula No. 11, and thus omit the plaster primer, and by such use the ceilings will receive but two coats of paint, you are advised that you will be held strictly responsible for lime burns or other blemishes that may show through the paint, and further that you are required to remedy same at your own expense and to the entire satisfaction of the Contracting Officer.
>
> The writer cannot stress too much the fact that a great deal of thought should be given to the manner in which you treat these ceilings before paint is applied, so that when the painting of concrete surfaces is completed you will have attained the result required by the Specifications.

The concrete work was well done, except that it did not comply with the specifications in that fins had been left in the concrete which developed at the place where the concrete

forms came together. These fins consisted either of protuberances where the concrete had run down between the two forms, or of depressions in the surface. After receipt of the above letter plaintiffs did some experimental work in undertaking to remove these fins, but did not succeed in doing so to the extent necessary to make an acceptable job, since after the paint had been applied the fins still appeared.

Had the concrete work been constructed in accordance with paragraph 4 (A), (a), and (b) of the specifications, ceilings would have been produced that would have been sufficiently level and smooth to have received the paint and would have produced a satisfactory paint job by the use of the paints specified, but the removal of these fins was expensive and they were not removed, but an alternative was adopted, as later appears.

8. Defendant's project engineer, on April 12, 1937, again wrote to plaintiffs, called their attention to the specifications relative to concrete and painting, and said:

> These concrete ceilings at the present time are not ready to receive paint. They are uneven, contain many pits and projections, show the joints made by the forms, and have many other imperfections. * * *
>
> These ceilings must be rubbed smooth in accordance with specification requirement to receive paint. They are not acceptable in their present state * * *.
>
> This office wishes to emphasize and make clear the fact that these ceilings must comply with the specification requirements in every respect and we also wish to urge that you take immediate steps to correct and smooth these concrete ceilings before any paint is applied.

9. On April 26, 1937, at the request of plaintiffs, a representative of the defendant went to the site and examined the several ceilings which plaintiffs had painted in experiments without prior full preparation of the concrete, but none of them were acceptable. On April 27, 1937, the presidents of the plaintiff companies went to Washington and talked to the defendant's chief engineer of inspection, and at his suggestion later looked at a project then under construction at Harlem, but nothing important came of this.

10. On May 13, 1937, defendant's project engineer wrote plaintiffs as follows:

> Please refer to the writer's letter to you dated April 12, 1937.
>
> The writer wishes to point out to you that since the date of the above mentioned letter no further progress has been made in connection with these ceilings and that painting of same has now been put off for a considerable length of time.
>
> It might be pertinent at this point to state that in view of the fact that the extended date of completion of your contract is May 4, 1937, you are now in technical default and it seems imperative that you take every means possible to proceed with the painting of these ceilings without any further delay.

11. Plaintiffs' paint subcontractor, Browning Decorating Company, had refused to paint the ceilings without the plaintiffs either preparing the concrete or giving it a letter assuming full responsibility for putting on the paint without previous preparation of the concrete, so on May 17, 1937, under an agreement with plaintiffs, the E. K. Perry Company, a widely experienced painting contractor of Boston, Massachusetts, sent some of its men to the site in an endeavor by experiment to produce satisfactory results on a few ceilings without previous full preparation of the concrete, but nothing they produced was satisfactory, mainly because the lines or ridges left by the form joints, even after rubbing and grinding, still showed through the paint.

12. Beginning about May 21, 1937, plaintiffs sent telegrams and letters to defendant contending in effect that the specifications as to concrete and painting were defective in that full compliance therewith would not produce an acceptable ceiling.

In the meantime, and on May 25, 1937, J. G. Gholston of defendant's inspection division, wrote plaintiffs a letter telling them that on some concrete ceilings satisfactory results had been obtained by applying one coat of casein-bound, textured paint of certain characteristics, one coat of washable casein paint of certain characteristics, and one coat of tint.

Plaintiffs tried this on a ceiling or two but it did not produce a satisfactory ceiling.

Some of the correspondence referred to is set out in detail in the following finding.

13. On May 21, 1937, plaintiffs sent the following telegram to the Director of the Inspection Division of the Federal Emergency Administration of Public Works in Washington:

> In reference to painting concrete ceilings Stamford Connecticut stop several concrete ceilings which have been painted in accordance with contract requirements have been rejected by project engineer stop in an endeavor to produce a ceiling which would be approved we have painted several ceilings using materials and methods exceeding contract requirements but these also are unsatisfactory to project engineer stop the results he insists upon cannot be obtained by the methods and materials specified nor can it be obtained by other materials and or methods which we have tried stop therefore please advise how you desire us to proceed in order that there may be no further delay and resultant expense because of this matter.

On May 25, 1937, plaintiffs sent the following telegram to the same officer:

> Please reply to our telegram of May twenty-first regarding painting Stamford project stop all other work except that dependent on completion of painting is substantially completed stop your failure to advise us how to proceed is causing delay and expense for which we hereby make claim.

On May 25, 1937, the Director of the Inspection Division wrote plaintiffs as follows:

> Reference is made to your telegram dated May 21 concerning the painting of concrete ceilings on the Fairfield Courts project, Stamford, Connecticut. It is assumed that your telegram refers to difficulty in complying with Specifications, Division XXIV, Painting, Section 3, paragraph 10, reading as follows:
>
> "Where painting of the concrete surfaces is required, and where in pursuance of the concrete specification the concrete has been rubbed or patched to eliminate irregularities, the paint shall be so applied as to render the

rubbed or patched surfaces the same in appearance as untouched surfaces. This shall include stippling if necessary."

For your information you are advised that a treatment of concrete ceilings as described below has produced satisfactory results on other projects where similar conditions have been encountered.

(a) One coat of Casein Bound Textured Paint of an approved make and complying with the following:

Casein Bound Texture Paint shall be a dry powder paint which is to be mixed with water to prepare it for use and shall show the following analysis:

Casein—Factor Nitrogen 7.7	Minimum 10%
Mica—Properly graded Fine	Minimum 20%
Hydrated Lime	Minimum 03%

Remainder to be properly balanced fillers; it shall be free from the compounds of mercury or other poisonous preservatives.

The resultant Casein Bound Textured Paint shall be a finely ground uniform mixture which disperses easily when mixed with water and which is free from lumps; it shall require 90 to 100 CC of Water per 100 grams for material producing a minimum texture, or 120 to 130 CC for light textures; it shall apply readily and shall not roll up under the brush or pull excessively, it shall take and hold various textures and shall show no tendency to melt, sag or break; it shall dry hard over night with no cracking on medium textured [sic] and no chalking on light textures.

This paint shall be applied so as to produce a stippled finish of approved texture; and

(b) Over the Casein Bound Textured Paint apply one coat of washable casein paint complying with Federal Specification No. TT–P 23, Section E–3, Grade B, Type II.

(c) Finished coats on both plastered and concrete surfaces shall be of tint or tints as selected by the Contracting Officer and shall also comply with the requirements of the division "Painting" under the heading "Colors".

Properly prepared concrete ceilings when treated as outlined above have produced acceptable finished surfaces on other projects.

It is suggested that a sample ceiling be prepared in accordance with the above and if found to produce a satisfactory result on Fairfield Courts, a proposal to change the contract requirements without change in

contract time or price will be entertained by the Government.

On June 3, 1937, defendant's Director of the Inspection Division telegraphed plaintiffs as follows:

> Assistant Chief Engineer Frank Anderson will be in Stamford Friday morning with full authority to settle question of acceptable finish of concrete ceilings stop presence of your authorized representative requested.

14. After further experiments and trips to the job by defendant's inspectors and engineers it was found that with very little, if any, preparation of the concrete, ceilings acceptable to the defendant could be obtained by the use of a casein-bound, textured paint and a second coat of casein paint very much like the paint described in Mr. Gholston's letter of May 25, 1937, outlined in finding 12. This was in the early part of June 1937, and defendant requested that as a condition to its agreement to accept the ceilings painted with the casein-bound, textured paint and second coat of casein paint, in lieu of previous full preparation of the concrete and the use of the specification formula paint, the plaintiffs should make a covering proposal providing for no additional payments to plaintiffs and no extension of the contract time. Since plaintiffs kept up their contention, stated in findings 12 and 13, they did not make such a proposal, but on or about June 14, 1937, began the painting as above described in this finding and carried it on through to completion, and defendant accepted the ceilings as satisfactory.

After the work had been finished plaintiffs presented defendant with an itemized statement of a claim for excess costs, with supporting documents.

15. It cost the plaintiffs more to put on the textured paint that they actually put on than it would have cost them to put on the formula paint called for in the specifications, but the elimination of the full preparation of the concrete more than offset this additional expense. The delay in doing the painting resulted in a delay in the final completion of the contract with a resulting increase in overhead expense.

The excess cost of using the substituted paint, plus overhead during the period of delay, is $9,243.03, made up of the following items:

1. Additional labor and material, including cost of workmen's compensation and liability insurance	$5,100.46
2. Less credit from subcontractor	735.01
	4,365.45
3. Plus 10% overhead	436.54
	4,801.99
4. Plus 10% profit	480.20
Net total	5,282.19
5. Overhead during period of delay	3,600.76
6. Plus 10% profit	360.08
Total	3,960.84
Grand total	$9,243.03

This excess cost, however, was incurred on account of the failure of the plaintiffs to prepare the concrete in accordance with paragraph 4 (A), (a) and (b) of the specifications. Any delay that may have been incurred in doing the painting was due to plaintiffs' failure to prepare the ceilings in accordance with the before-mentioned paragraph of the specifications.

16. On June 29, 1937, defendant's project engineer demanded that the plaintiffs paint the kitchens, utility rooms and toilet rooms with two additional coats of oil paint, although plaintiffs had painted the kitchens, utility rooms, and toilet rooms with two coats of casein paint as required by Assistant Chief Engineer Anderson. Because of the demand of the project engineer two coats of oil paint were also applied to these rooms.

On July 12, 1937, plaintiffs wrote to the Director of the Inspection Division of the Federal Emergency Administration of Public Works objecting to the requirement of the project engineer that the ceilings of the kitchens, utility rooms, and toilet rooms be painted with oil paint and advising the Director that the cost of painting the ceilings of

these rooms in this manner would be made a part of the plaintiffs' claim.

On September 2, 1937, H. A. Gray, Director of Housing of the Federal Emergency Administration of Public Works, ruled that the plaintiffs should not have been required to apply the oil paint to the ceilings of the kitchens, utility rooms, and toilet rooms and advised the defendant's project engineer as follows:

> It is noted that the Contractor has proceeded to paint these kitchens with casein-bound textured paint and has finished them with a coat of washable-casein paint. It is also noted that the Project Engineer has ruled that in addition the Contractor must furnish two coats of oil paint over the textured paint on the ceilings of the rooms in question.
>
> In view of the fact that the authority to modify the painting requirements was granted in an endeavor to make the ceilings more presentable than they would have been had the original specifications been followed, I do not consider that it would be equitable to require the Contractor to furnish additional coats of oil paint. You are, therefore, requested to inform the Contractor through the Project Engineer that I do not consider that the contract as modified required the additional coats of paint.

The proof does not show the cost of putting on these two additional coats of oil paint in the kitchens, utility rooms, and toilet rooms. Whatever it may have cost is included in plaintiffs' claim for the cost of using the substituted paint, but the amount of it does not separately appear.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs had a contract for the construction of the superstructures for the houses in the Fairfield Court Housing Project at Stamford, Connecticut. Included in the contract was the painting of the concrete ceilings in the dwellings. Plaintiffs were unable to paint these ceilings to the satisfaction of the contracting officer by using the paint specified, and finally used a different sort of paint which produced a

satisfactory job. The excess cost of the substituted paint and labor and overhead and profit was $9,243.03. For this amount plaintiffs sue.

Defendant does not deny that this excess cost was incurred in doing the paint job, but it says that plaintiffs' failure to prepare the concrete ceilings in the manner specified was the thing that made it necessary to use a different paint from that specified and, hence, that it is not liable for the excess cost.

Paragraph 4 of the specifications relates to concrete work. Paragraph (A), with subparagraphs (a) and (b), relate to exterior concrete surfaces exposed to view, to interior exposed concrete surfaces in spaces where glazed-finish tile or brick occurs, and to interior exposed concrete surfaces in spaces where plastered walls occur. Paragraph (B) relates to interior concrete surfaces, except in spaces where plastered walls occur and except in spaces indicated on the drawings as "Pipe Spaces." Paragraph (C) relates to all other surfaces of concrete work. The painting in controversy was of interior exposed concrete ceilings in rooms with plastered walls and these concrete ceilings, therefore, are governed by paragraph (A) and subparagraphs (a) and (b). They are not governed by paragraph (B) because there is excepted from its provisions "spaces where plastered walls occur." Paragraph (B) evidently refers to the ceilings in basement rooms or other rooms the walls of which were not plastered. The concrete ceilings of those rooms the walls of which were plastered are governed by paragraph (A).

The concrete work governed by paragraph (A) was the best of that specified; that governed by paragraph (B) did not have to be quite so level and smooth; and that governed by paragraph (C) could be even rougher. Paragraph (A) required that the concrete surface should be "level and smooth to receive paint," and it further specified in subparagraph (a) that the material used for form work should produce "a level, dense surface, free from honeycombing, joint marks, fins, bulges, depressions, or marks showing the grain of the wood forms." It was further required in subparagraph (b), "Any defects that may appear shall be rubbed smooth with carborundum stone, or by other means, if nec-

essary, until the surfaces meet with the approval of the contracting officer."

The concrete surfaces mentioned in paragraph (B) also had to be free from fins and honeycombing, but this paragraph made no mention of "joint marks, fins, bulges, depressions, or marks showing the grain of the wood forms."

It is not denied that the concrete in the rooms, the walls of which were plastered, did have fins and were not sufficiently level and smooth to receive the paint specified.

Plaintiffs tried a number of times to paint these ceilings so that the fins and depressions and other rough places in the concrete would be hidden, but they were unable to do so. After the paint had been applied the fins still appeared. Plaintiffs tried to remove these fins by the use of carborundum stone, but still were unable to do so successfully. After the paint was applied the fins still appeared. The contracting officer, therefore, was wholly within his rights in rejecting the work.

Quite a good deal of time was consumed in trying to produce a satisfactory result, and finally one of defendant's employees in its Inspection Division suggested to plaintiffs the use of a different sort of paint, and plaintiffs finally succeeded in obtaining satisfactory results by using a paint very similar to that suggested by defendant. Defendant then told plaintiffs it would agree that they might use this substitute paint instead of requiring them to prepare the concrete in the way specified, but with the understanding that no additional payment should be made to plaintiffs and no extension of the contract time would be granted.

Plaintiffs refused to agree to this because they insisted that the paint specified would not produce a satisfactory result, but they did proceed to paint the ceilings with the substituted paint; and at the conclusion of the work they presented their claim for the excess cost.

The evidence leaves no doubt that the ceilings had not been prepared in the way called for by the specifications, and we are of opinion that this is the reason that the paint specified would not produce a satisfactory job. In order to properly prepare the ceilings plaintiffs would have been required to do a great deal of work, which would have cost more than it

cost them to use the substituted paint. Instead of doing this, they used the more expensive paint. Its use would not have been necessary if the concrete surfaces had been properly prepared.

Plaintiffs also complain of the requirement of the Project Engineer that two additional coats of oil paint should be applied in the kitchens, utility rooms, and toilet rooms; but whether this requirement was proper or not, plaintiffs are not entitled to recover on this account because the proof does not show the cost of this item. Whatever it may have cost is included in plaintiffs' general claim for the additional cost of using the substituted paint. The cost of this item is not separated from the total excess cost.

Plaintiffs are not entitled to recover. Their petition will be dismissed. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, took no part in the decision of this case.

B-W CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43915. Decided November 5, 1945]*

On the Proofs

Government contract; unreasonable delay due to errors in contract drawings.—Where plaintiff entered into a contract with the Government for the construction of extensions and additions to the Post Office Building at Washington, D. C.; and where on account of errors in the contract drawings relating to the subsoil drainage system below the subbasement of the new building there was an unreasonable delay for which the defendant was responsible; it is *held* that the plaintiff is entitled to recover. *Arnold M. Diamond* v. *United States*, 98 C. Cls. 543, 551, cited. ($254.65.)

Same; delay due to impractical specifications.—Where it was found to be impractical to follow the specifications with reference to the underpinning of certain walls of the old building; and where plaintiff prepared and submitted a new plan for the underpinning, which was accepted; it is *held* that plaintiff is entitled to recover for the extra expense caused by the delay, for which the

*Defendant's petition for writ of certiorari denied March 4, 1946.

Government was responsible. *Nils P. Severin* v. *United States*, 102 C. Cls. 74, 85. ($3,240).

Same; recovery of proportionate part of office overhead during period of delay.—Where the numerous change orders and the slowness of the defendant in acting on the proposed and necessary changes caused a great deal of delay in the work, although much of it ran concurrently; and where it is found that there was a total over-all delay in the completion of the contract, due to the fault of the defendant, of at least 60 days; it is *held* that the plaintiff is entitled to recover a proportionate part of its office overhead allocable to its Washington and Chicago offices. ($14,375.)

Same; rental of machines and typewriters during delay period; additional insurance.—Plaintiff is entitled to recover for rental of machines and typewriters during the period of delay for which defendant was responsible and for additional insurance expense during the delay period. ($686.)

Same; verification of dimensions and measurements by contractor.—Where the specifications stipulated that the approval of shop drawings would be general and would not relieve the contractor from the responsibility for proper fitting and construction of the work nor from furnishing materials and work required by the contract which might not be indicated on the shop drawings when approved; and where the specifications also stipulated that all dimensions shown of existing work and all dimensions required for new work to connect with work in place should be verified by the contractor by actual measurement; it is *held* that the plaintiff is not entitled to recover for extra expense incurred to procure additional steel and to splice rods in order to obtain the length required by the construction engineer.

Same; failure to appeal.—Where plaintiff failed to appeal the adverse decisions of the contracting officer to the head of the department, as provided by the contract, there can be no recovery. *United States* v. *Blair*, 321 U. S. 730, 735. (See also 101 C. Cls. 870.)

Same; agreement by unauthorized representative.—There can be no recovery for extra expense incurred for temporary heat in accordance with an agreement made by an unauthorized representative of the Government.

Same; cost of rerouting concealed pipe not shown on drawings.—Where the contract drawings failed to show a steam pipe that had to be rerouted in order to permit the installation of conveyor belt equipment; and where the pipe was concealed from view; it is *held* that plaintiff is entitled to recover for the reasonable cost of rerouting the pipe. *Maurice H. Sobel* v. *United States*, 88 C. Cls. 149, 165, cited. ($1,040.73.)

Same; offset of extra expense against contract reduction.—Where, upon defendant's written order, plaintiff incurred extra expense in grading, leveling and repairing cement floors, for which defendant agreed to pay; and where defendant accepted plaintiff's later proposal to offset this item against a reduction to which defendant was entitled because of the omission of a contract requirement that plaintiff remove certain cement floors; plaintiff is not entitled to recover more.

Same; fair and reasonable payment for cost of temporary driveway and loading platform.—Where the specifications required that plaintiff should provide the necessary temporary driveways in order to maintain uninterrupted service of vehicles to the mailing platforms during construction; and where the bridge which plaintiff proposed to construct by driving piles would have been inadequate and dangerous, and the driving of piles would have obstructed the driveway; and where the defendant demanded and secured a safe bridge or driveway at no more cost to the plaintiff than was fair and reasonable; it is *held* that the plaintiff is not entitled to recover more.

Same; insufficient proof; failure to pursue proper remedy.—Where, as to certain items of plaintiff's claim, the proof of damages is not satisfactory or plaintiff failed to pursue the proper remedy or to follow the stipulated procedure specified in the contract; there can be no recovery.

The Reporter's statement of the case:

Mr. Dean Hill Stanley for the plaintiff. *Mr. Joseph R. McCuen* was on the briefs.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Newell A. Clapp* was on the brief.

The court made special findings of fact as follows:

1. By contract dated April 23, 1932, the plaintiff, an Illinois corporation with its principal office at Chicago, Illinois, undertook to furnish all labor and materials and perform all work required for the extension to and remodeling and enlarging of the Post Office at Washington, D. C., for the consideration of $2,999,000, the work to be commenced as soon as practicable after the date of receipt of notice to proceed and to be completed within 720 calendar days after the date of receipt of notice to proceed. The contract is in evidence (Plaintiff's Ex. 2) and made a part hereof by reference.

The notice to proceed was received by plaintiff on June 22, 1932, and the 720 days for completion of the contract therefore ended on June 12, 1934. During the progress of the work plaintiff was granted extensions of time against the liquidated damages penalty of the contract totaling 362 days, of which 267 days were because of change orders and 95 days because of strikes, bad weather, and defaulting subcontractors. The work was completed within the contract time as thus extended, substantial completion being accomplished about March 15, 1935, but corrections noted in the final inspection were not completed until the last of July 1935. No liquidated damages were assessed.

The performance of the change orders did not actually delay final completion as much as 267 days. In fact, it did not delay the final completion more than 50 days. The extensions because of change orders were nearly always granted before the work was done and were based almost entirely on mere estimates, and the work involved in the change orders amounted to less than $90,000.

2. The Post Office at Washington, D. C., had been constructed about 1912 or 1913. It fronted on the north side of Massachusetts Avenue and extended through from First Street NE. on the east to North Capitol Street on the west. It extended northward from Massachusetts Avenue a distance of between a third and a half of the block to G Street. Between the north wall and G Street (which area the Government also owned) there was a paved driveway running from First Street to North Capitol Street along the north wall of the building and the loading platform of the building. There was also another paved driveway extending from this driveway to G Street, and a garage building between the Post Office building and G Street. The work to be done under the contract consisted of tearing down the garage building and extending the Post Office building through to G Street and of repairing and remodeling the Post Office building (hereinafter called the old building) so as to end up with a single large building, with uniform construction, trim, design, and appearance, extending from Massachusetts Avenue to G Street and from First Street to North Capitol Street.

The wall along the north side of the old building was not a straight solid wall extending through from First Street to North Capitol Street, although it was for a distance of 60 feet west of the east side of the old building on First Street and for a distance of 60 feet east of the west side of the old building on North Capitol Street. In between was a loading platform about 225 feet long covered by a heavy metal canopy. The outside edge of this loading platform was on a line with the two 60-foot stretches of the north wall, and there was of course a wall behind (south of) it, although it was not as high as the two 60-foot stretches. The old building thus had what is called a wing (extending north and south) at First Street and another similar wing at North Capitol Street, designated, respectively, as the east and west wings of the old building. Over the low center part of this north side of the old building there was a saw-tooth roof which was not nearly as high as the roof over the wings and which by vertical skylights permitted the entrance of light into the old building. The new part was also to have a similar saw-tooth roof for a distance, but the wings were to be carried on to G Street at a uniform height.

The new part of the building was to have a somewhat deeper foundation than the old building. It was to have both a basement and a sub-basement, whereas the old building had only a basement. In addition to the basement, the old building had a ground floor and first, second, and third floors. The new building was to be the same but with the addition of the sub-basement.

3. By 1932, the old building had become badly congested because of the growth of the post office activities at Washington and it was because of this congestion that it was decided to have the extension, remodeling, and enlarging work done.

The instructions to bidders which were sent to plaintiff and the other prospective bidders contained the following paragraph:

> Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

The specifications contained the following:

> 15. VISIT TO SITE.—Bidders should fully inform themselves as to the location of the site and as to the conditions under which the work is to be done. Failure to take this precaution will not relieve the successful bidder from furnishing all material and labor necessary to complete the contract without additional cost to the Government.
>
> 68. MANNER OF CONDUCTING THE WORK.—The present Post Office Building will be occupied during the life of the contract hereunder. The work shall be so done as to cause no interruption to the Government business. The contractor shall provide satisfactory temporary facilities to permit all business to be continued during the operations under the contract.
>
> 74. The Contractor shall fully inform himself under what conditions and how the work may be performed, so the work will be conducted in such a manner as to afford the maximum protection to the present building and facilities, and to Government employees, and to the public, and to provide insurance against any unreasonable delay or interference in the operation of the Post Office.
>
> 103. Such temporary adjustments and readjustments on the interior of the present building as are made necessary on account of the removal of walls and other parts shall be made to existing work which is to remain, to permit uninterrupted occupancy and transaction of Government business.

Notwithstanding the congestion and these paragraphs, plaintiff elected to do the constructing of the new building and the remodeling of the old building simultaneously, although it could have merely made the necessary connections with the old building, constructed the new building first and then remodeled the old building.

4. Plaintiff began the work on June 28, 1932, and in July 1932, a conference was held between representatives of plaintiff and defendant with reference to the doing of the work. At this conference the representatives of the defendant, particularly the representatives of the Post Office, told the representatives of the plaintiff that it would not be possible, because of the neceessity of keeping the Post Office work going, to surrender many spaces in the old building, and they

stated that they thought that plaintiff should first go forward with the construction of the new building so that some of the Post Office employees could be moved into the new building and thus permit the remodeling of the old building without interrupting the business of the Post Office.

Nevertheless the plaintiff, on August 2, 1932, submitted to defendant a schedule showing numerous spaces in the old building that it desired the defendant to surrender, the times at which it desired such surrenders, and the length of time it would need the spaces. On March 23, 1933, February 15, 1934, and September 10, 1934, plaintiff submitted to defendant similar schedules. With the exception of the schedule of September 10, 1934, it was impossible for defendant to surrender a good many of the spaces set out in the schedules without interrupting the business of the Post Office, and defendant did not surrender them. It did, however, surrender all of the spaces that it could surrender without interrupting said business.

In August 1932, plaintiff at defendant's request, constructed as a temporary facility a mezzanine floor, containing 3,200 square feet, in the first floor of the old building. This mezzanine was sufficient to take care of the Post Office employees working at and near to the north wall in the old building, but was not large enough to take care of the Post Office employees working in many other spaces in the old building designated in the schedules and possession of which was desired by the plaintiff. The mezzanine was used by the Post Office employees to its full capacity for two or three months, but by the end of the year its use had dwindled to half capacity, and at the end of 18 months only 20 persons out of a capacity of about 75 were using it. It was not practicable to use the mezzanine for some phases of the work. It could not be used by any unit or postal employees who had to deal with the public. It was not practicable to use it for distribution of the mail. It did enable the defendant to surrender a few of the spaces which plaintiff desired, and defendant surrendered them.

The greater part of the delay in completing the contract, with its resulting additional cost and expense to plaintiff,

resulted from the inability of the defendant to surrender spaces in the old building at the times plaintiff desired such spaces, but since defendant could not surrender such spaces without badly interrupting the business of the Post Office, there is no satisfactory evidence to support plaintiff's claims except as hereinafter stated.

Paragraph 17 (a) of Petition

5. Soon after the letting of the contract, one of plaintiff's subcontractors raised certain questions as to the proper interpretation of the contract provisions as to the heating, plumbing and ventilating equipment and plaintiff, on August 1, 1932, submitted to defendant a request for interpretations. On August 23, 1932, defendant interpreted the specifications on all points submitted except as to certain pressure-reducing valves, as to which it told plaintiff that it would be advised later—there having been an error with respect to said pressure-reducing valves and a discrepancy between the requirements of the drawings and specifications in regard thereto which made an additional drawing necessary.

The defendant's architect made a new drawing with respect to said presure-reducing valves and it was submitted to plaintiff on October 6, 1932, with instructions to install the work in the manner therein shown. On November 2, 1932, plaintiff submitted to defendant its proposal for the change required by the new drawing, the proposal being in the amount of $898.32, and on January 10, 1933, defendant advised plantiff that the proposal should include certain additional work. On January 11, 1933, plaintiff submitted to defendant a proposal for additions and revisions of defendant's new drawings relating to the steam pressure-reducing valves, which additions and revisions were necessary because job conditions would not permit the installation in the manner indicated in the new drawings. This proposal did not contemplate any payment to plaintiff in addition to that suggested in plaintiff's former proposal of November 2, 1932.

On June 23, 1933, the defendant accepted plaintiff's proposal of November 2, 1932, as revised by its proposal of January 11, 1933, and plaintiff was so notified.

PARAGRAPH 17 (b) OF PETITION

6. On October 3, 1932, plaintiff advised defendant that the Potomac Electric Power Company had notified it that the oil switch room in the basement of the old building was too small and that the high-powered equipment to be installed therein would necessitate the moving of the brick wall between columns 155 and 157 a distance of six feet westward from its then location. Defendant caused its architect to make the necessary additional drawings and the same were submitted to plaintiff on December 14, 1932, with the request that plaintiff submit a proposal for enlarging the oil switch room. Plaintiff submitted its proposal on January 24, 1933, in the amount of $2,482.62. On February 3, 1933, defendant rejected the proposal as being excessive.

On February 11, 1933, plaintiff submitted another proposal, in the amount of $1,271.53, having reduced the price of certain items and eliminated others in its former proposal. This proposal was accepted by defendant on April 7, 1933.

PARAGRAPH 17 (c) OF PETITION

7. Article 13 of the contract provided:

> *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

In the summer of 1933, defendant requested bids for the placing of a new roof on the saw-tooth roof or skylight mentioned in finding 2. Plaintiff protested the letting of the reroofing to an independent contractor because of paragraph 1139 of the specifications as follows:

> 1139. Remove the glass from all of the windows in the existing saw tooth skylights and reglaze said windows

with new glass of same kind as that specified for the windows in new saw tooth skylights. Execute all sheet metal work involved in reglazing the said windows and in restoring them, in all respects, to as good conditions at completion of the work as that in which they were found at commencement of the work.

Plaintiff insisted to defendant that the giving of this work to another contractor would interfere with its work and requested that it be allowed to do the reroofing as an extra under its contract. This was refused by defendant.

The first bids were rejected by defendant, and the plaintiff, on March 30, 1933, having reported that certain metal work of the skylight frames was corroded and should be replaced and having proposed to do the work for an additional $4,406.82, the defendant requested plaintiff to submit a proposal to omit the labor of installing the new glass required by plaintiff's contract, the same to be stored in the building. So, plaintiff, on August 8, 1933, submitted a proposal to deduct $52.00 on this account, and this proposal was accepted by defendant on September 22, 1933.

New specifications were drawn for the reroofing, including the repairs to the metalwork; bids were called for and were opened on August 4, 1933, the plaintiff having again protested on July 28, 1933. On December 28, 1933, the reroofing contract was awarded to the lowest bidder, a contractor other than plaintiff, and notice to proceed was given on January 26, 1934. However, because of weather conditions the work was not started until March 1934.

The mail-handling equipment was on the floor beneath the saw-tooth roof and under plaintiff's contract this equipment was supported by hanger rods extending through the slab of the saw-tooth roof with a nut or similar device at the top to provide a bearing. After the new roof had been installed defendant was unwilling for the hanger rods to go through. This made it necessary that a new method be devised for attaching the hanger rods, and on September 20, 1934, plaintiff suggested such method, no additional compensation being requested at the time. On October 22, 1934, defendant approved the new method and told plaintiff to proceed with it, which plaintiff did.

In the meantime, i. e., on May 23, 1934, while the reroofing was being done, plaintiff requested the defendant to instruct the roofing contractor to omit that portion of the new copper roof over the mail-handling equipment until the plaintiff could install the hanger rods in accordance with the original method. Defendant refused this request and the reroofing was completed on July 1, 1934, before plaintiff could install the hanger rods in accordance with the original method. A strike of carpenters and millworkers prevented plaintiff from installing the hanger rods between May 23, 1934, and July 1, 1934. Although plaintiff might possibly have installed the hanger rods before May 23, 1934, it was nevertheless delayed in installing them by the action of the defendant.

Paragraph 17 (d) of Petition

8. Article 3 of the contract provided:

> *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

The specifications provided as follows:

> 72. Alteration and reconstruction work shall, so far as possible, be done in definite sections or divisions, and the work confined to limited areas, in which the work shall be completed, before other sections or divisions are commenced, as may be directed by the construction engineer.

On March 12, 1934, defendant ordered plaintiff to stop, and plaintiff therefore did stop, the remodeling work on the third floor of the old building along the north wall thereof and intersecting corners of the court, as the remodeling in this area was being reconsidered by defendant, and on July 26, 1934, defendant submitted to plaintiff drawings for changes in the remodeling work on said third floor, with request that plaintiff submit a proposal therefor. On September 5, 1934, defendant supplemented its request for a proposal by adding certain items thereto. On September 10, 1934, plaintiff submitted a proposal in the amount of $1,974.55, but on October 12, 1934, was advised by defendant that the proposal was considered to be excessive. In the letter of October 12, 1934, defendant also told plaintiff to proceed with the work covered by the proposal and that the amount of the addition or deduction therefor would be determined later. This course was adopted. On November 23, 1934, plaintiff submitted another proposal in the amount of $1,447, which was not accepted. Finally, on January 2, 1935, in order to obtain the release of the space it needed to proceed with the remodeling on the third floor, the plaintiff submitted a proposal that there should be no change in the contract price because of the change in the work, and this proposal was accepted by defendant on February 8, 1935.

Paragraph 17 (e) of Petition

9. On October 15, 1932, plaintiff called defendant's attention to errors in contract drawing P-450 relating to the subsoil drainage system below the subbasement of the new building. The system would have been improperly pitched so that the water would not have been carried off. Defendant not having replied to plaintiff's letter of October 15, 1932, calling attention to errors, plaintiff, on December 7, 1932, submitted to defendant a proposal in the amount of $2,630.54 for making changes. On January 20, 1933, defendant requested plaintiff to submit a proposal in accordance with specifications which defendant stated in said request and which varied somewhat from the changes previously proposed by plaintiff, and on February 20, 1933, plaintiff sub-

mitted a proposal in the amount of $2,892.45. This proposal was considered by defendant to be excessive and plaintiff was so advised. By letter of March 3, 1933, plaintiff submitted another proposal, in the amount of $1,600.17. This letter also contained a proposal, in the amount of $239.58, for certain additional work believed to be necessary, and both proposals were accepted by defendant on April 3, 1933.

PARAGRAPH 17 (f) OF PETITION

10. On March 12, 1934, defendant instructed plaintiff to stop, and plaintiff therefore did stop, work on the interior of the bridge extending across First Street to the Union Station so that it could make a further study of the arrangement of the doors to said bridge, i. e., the possible installation of an "electric eye." On August 10, 1934, defendant advised plaintiff to proceed with the construction of the bridge in accordance with the original contract requirements, which plaintiff then did.

PARAGRAPH 17 (g) OF PETITION

11. On March 20, 1934, defendant requested plaintiff to submit a proposal for modification of the contract requirements relating to the flooring in the basement and ground floor of the old building. On May 31, 1934, plaintiff made a proposal in the amount of $5,310.69 for the work on the basement floor, and in the amount of $8,706.43 for the work on the ground floor. Also, plaintiff proposed, for $5,190.90, to do certain related work involving grading, leveling, and repairing of existing cement floors on which the new floor was to be laid, which work plaintiff claimed was outside the contract requirements.

On June 5, 1934, plaintiff submitted a revised proposal in the amount of $4,705.60 for the work on the basement floor and $6,503.02 for the work on the ground floor. Plaintiff also proposed to do the related work involving grading, leveling, and repairing of existing cement floors on which the new floor was to be laid for $3,357.99.

On October 18, 1934, plaintiff submitted another proposal, incorporating additional changes, in the amount of $4,059.79

for the work on the basement floor and $5,715.55 for work on the ground floor, and in the amount of $3,357.99 for the related work involving grading, leveling, and repairs of the existing cement floor on which the new floor was to be laid. On December 20, 1934, defendant accepted the proposal of $4,059.79 and $5,715.55 for the work on the basement and ground floors, respectively, but ordering the plaintiff to proceed with the grading, leveling, and repair of the existing cement floors on which the new floor was to be laid on the basis of cost plus 10% overhead and 10% profit, but not to exceed $4,500. The cost of this grading, leveling, and repair is subject of controversy set out in finding 27 in connection with paragraph 31 of the petition.

Paragraph 17 (h) of Petition

12. The contract required, after the removal of an hydraulic elevator on the ground and first floors near column 35, the closing of the openings in said floors and the laying of flooring thereon. In order to do this steel girders were required. The drawings which purported to show the measurements in the structural steel around the hatchway of the elevator were incorrect. Therefore, it became necessary that plaintiff have the girders fabricated in accordance with new drawings.

On November 29, 1933, plaintiff notified defendant of the error in the drawings, and on December 29, 1933, defendant requested plaintiff to submit a proposal. On February 7, 1934, plaintiff submitted its proposal in the amount of $886.45, and the same was accepted by defendant on March 1, 1934.

Paragraph 17 (j) and (k) of Petition

13. One of the first things that had to be done in the performance of the contract was to underpin the two 60-foot sections of the north wall of the old building in the wings at First Street and North Capitol Street so that the footings for the adjacent columns of the new building could be put in at the lower depth required by the subbasement of the new building. The contract contemplated that this underpinning

should be done from the inside of the basement of the old building. It was also necessary to tear down these two 60-foot sections of the north wall and open up the columns thereof so as to connect the weight-carrying steel therein with the steel framework of the new building.

In the east wing of the old building, right at the 60-foot stretch of the north wall thereof and near column 35, there was an hydraulic freight elevator capable of carrying loaded trucks, and the machinery that operated this elevator was at the north wall in the basement of the old building. Near this hydraulic elevator there was another but smaller and lighter freight elevator operated by electricity and known as Elevator No. 5, which was near column 32 and adjacent to the east wall of the wing—but not the north wall—and its continued operation would not interfere with the underpinning or tearing down of the north wall or with the opening of the columns thereof.

The plaintiff also was to construct the openings in the floors of the old building for three new elevators, known as Elevators Nos. 17, 18, and 19, toward the rear but near the center of the old building. The construction, installation, and repairing of elevators was not to be done by plaintiff but was to be done by an elevator company under a separate contract with defendant.

Addendum No. 1 to the specifications, with reference to the hydraulic elevator near column 35 and other hydraulic elevators, and with reference to the electric elevator known as Elevator No. 5 near column 32, contained the following paragraph:

> * * * The hoistway enclosures and the hoistway doors of the hydraulic elevators in place in the present portion of the building near columns 35, 91, and 161 are to be removed by this contractor. The hydraulic elevators and the hydraulic elevator equipment, consisting of cars, counterweights, guide rails, piping, pumps, storage and pressure tanks, etc., will be removed by the elevator contractor. The hoistway enclosure and the hoistway doors of the hydraulic elevator located near column 35 shall remain in place and no work performed which will prevent its operation until the remodeling work on the present electric elevator located near column

32 is completed and the elevator is placed in operation. The remodeling of the present electric elevators will be performed by the elevator contractor.

The Government's draftsman of the above provisions overlooked the fact that the electric elevator near column 32 (Elevator No. 5) could not do the work of the hydraulic elevator at the north wall near column 35, and when plaintiff asked for the surrender of the hydraulic elevator and machinery thereof near the north wall and column 35 so that it could underpin said north wall in the east wing near First Street, the defendant refused to surrender it and in fact informed plaintiff that it would not surrender said hydraulic elevator and machinery until Elevators Nos. 17, 18, and 19 had been installed and put in operation. This refusal, for the time being, prevented plaintiff from doing the important work of underpinning the 60-foot stretch of the north wall of the east wing which needed to be done early in the attempted performance of the contract, and it prevented plaintiff from tearing down said north wall and opening the columns thereof so as to connect the steel.

Plaintiff had construed the paragraph as indicating that the hydraulic elevator near column 35 would be surrendered as soon as Elevator No. 5 had been repaired, and had thought that it could underpin the north wall as soon as needed. When it learned that said hydraulic elevator would not be surrendered until Elevators Nos. 17, 18, and 19 had been installed and put in operation, plaintiff set about to devise some method of underpinning the north wall in the east wing different from the method contemplated in the contract. Finally it discovered that by extending the use of the Moretrench System which it was using to get rid of subsurface water on the site, it could lower the subsurface water at and about the east wing several feet and so dry out the soil there as to be able to underpin the 60 feet of the north wall in that wing from the outside and without the necessity of dismantling the hydraulic elevator—and at less expense to defendant than by the method provided in the contract.

In January 1933, plaintiff prepared and submitted to defendant the new plan of underpinning the 60 feet of north

wall in the east wing and it was approved by the defendant on January 31, 1933. This new plan of underpinning was not only less expensive to the defendant than the plan provided in the contract but it enabled the plaintiff to do the underpinning from the outside and without the surrender of the hydraulic elevator. The plaintiff began the underpinning as soon as the new plan had been approved by defendant and finished it March 6, 1933, about two months later than originally planned.

Elevators 17, 18, and 19 were not installed until May 1933, and, because of lack of an appropriation for alternating current, were not put into operation until August 1933. The hydraulic elevator near column 35 was not abandoned or surrendered until October 8, 1933. Since the steam headers connecting the heating system of the new building with the heating system of the old building, from which the heat for the new building had to come, were to be installed in the area of the basement of the old building where was situated the machinery that operated the hydraulic elevator near column 35, plaintiff was unable to install said steam headers until after October 8, 1933, much later than it had originally intended.

14. The Economy Acts (47 Stat. 382; 47 Stat. 1489; 48 Stat. 8) slowed down the defendant somewhat in acting on the contemplated changes and change proposals dealt with in the foregoing findings but the extent of the delay, if any, resulting from said Acts does not appear.

15. Because of the delay caused to plaintiff by defendant outlined in findings 9 and 13 (Paragraph 17 (e), 17 (j), and 17 (k) of Petition), plaintiff had to pay the Pennsylvania Railroad Company $2,801.13 of so-called storage charges on structural steel which it had had sent to Washington in time to be installed at the completion of the underpinning as originally planned. However, plaintff, on its books, charged $2,767.81 of this amount against its subcontractor, Oscar Daniels Company, but later in the settlement of a lawsuit, which Oscar Daniels Company brought against it, agreed to pay Oscar Daniels Company one-half of any amount it may recover in the present case because of the $2,801.13 of so-

called storage charges on structural steel. The so-called storage charges of $2,801.13 included $2,546.48 of crane charges which plaintiff would have had to pay the Pennsylvania Railroad Company if it had not stored the structural steel. The so-called storage charge was at the rate of 55 cents per ton, of which 50 cents was crane charge. The crane charge was not in effect at the time the contract was executed but it went into effect October 22, 1932 (Plaintiff's Ex. 216), and would have had to be paid by plaintiff in any event. Plaintiff therefore paid only $254.65 of actual storage charges.

16. Because of the delay caused to plaintiff by defendant outlined in finding 13 involving the underpinning plaintiff had to keep in operation for an additional 45 days a Moretrench System for which it had to pay a rental of $700 per month. The rental for the 45 days, therefore, amounted to $1,050. Plantiff also had to pay an additional operating expense of said Moretrench System amounting to $1,944 during said 45 days.

Also because of the delay caused to plaintiff outlined in finding 13 (surrender of hydraulic elevator near column 35) plaintiff was put to an expense of $250 in installing a temporary heat connection to the new building.

17. The errors of defendant and its long delays in correcting them and in deciding questions and acting on change proposals (outlined in findings 5 to 13, inclusive) together delayed the final completion of the contract for a period of 60 days, and caused plaintiff to incur losses or expenses as follows:

Overhead of the Washington, D. C., office of plaintiff chargeable to the Post Office job during the last 60 days prior to the substantial completion of the contract on or about March 15, 1935, amounted to $8,500.

After eliminating certain items, the overhead of the Chicago, Illinois, office of the plaintiff allocable to the Post Office job on the basis of the ratio of the monthly gross of the Post Office job to the gross of all jobs being performed by plaintiff during said last 60 days amounted to $5,875.

Rental value of a compressor on the job (not included in overhead) during said last 60 days was $500, three adding

machines $24, and four typewriters $24, making a total of $548.

Insurance expense (not included in overhead) amounted to $138.00 during said 60-day period.

18. Plaintiff on several occasions during the performance of the contract protested to defendant both orally and in writing that it was being delayed by defendant, and it advised defendant on several occasions that it would expect to be paid the cost and expense resulting to it from said delays, and on the completion of the contract plaintiff filed with the contracting officer, the Director of the Procurement Division of the Treasury, a claim for damages resulting from the delays. Thereafter, the contracting officer prepared a statement of facts (Plaintiff's Ex. 201) which he transmitted to the Comptroller General of the United States (but without sending plaintiff a copy or otherwise advising it) stating that there had been delays not mentioned in the extensions of time granted by the defendant in relief from liquidated damages because of change orders, but that a claim for the same would constitute an unliquidated claim for breach of contract which he had no authority to settle or to make findings of fact in regard to. The statement of facts ended by saying that, "This Department has no authority in law to liquidate or attempt to liquidate such a claim for breach of contract." The Comptroller General took no action in regard to the statement of fact. Plaintiff never at any time appealed to the head of the department, either Treasury or Post Office.

19. Article 15 of the contract provided as follows:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

PARAGRAPH 24 OF PETITION

20. Paragraphs 50 and 285 of the specifications provide as follows:

> 50. SHOP DRAWINGS.—Shop drawings hereinafter required, shall, unless otherwise specified, be submitted in quintuplicate to the Architects for the building and their approval obtained before any work for which such drawings are required is commenced.
>
> 285. SHOP DRAWINGS.—Bending and assembling diagrams showing shapes, dimensions, and details of reinforcing bars and accessories for securing and supporting the same shall be submitted in quintuplicate for the approval of the Architects.

Plaintiff submitted to defendant's architects shop drawings for the reinforcing steel rods for the slabs and foundation wall. The architects stamped on these shop drawings the following:

> Approved as to size and type of materials. December 16, 1932.

The shop drawings were then returned to plaintiff and plaintiff procured the reinforcing steel rods in accordance therewith. When the rods were about to be installed, defendant's construction engineer refused to permit their installation because he thought the rods were not quite long enough to afford a sufficient bearing on the beams. Plaintiff, therefore, had to procure additional steel and splice the rods in order to obtain the length required by the construction engineer, and the cost thereof to plaintiff, including 10% for overhead and 10% for profit, was $2,353.52. Plaintiff made a claim for the $2,353.52, but the same was denied by defendant. Plaintiff did not appeal to the head of the department.

The specifications also provided as follows:

> 52. The approval of shop drawings will be general and shall not relieve the contractor from the responsibility for proper fitting and construction of the work nor from furnishing materials and work required by the contract which may not be indicated on the shop drawings when approved. The approval of shop drawings

shall not be construed as approving departures from full-size drawings furnished by the Supervising Architect and/or Architects for the building.

54. DESIGNATION OF MATERIALS.—As a general guide to the contractor in executing the work, conventional methods have been adopted to designate materials on the drawings, although all necessary materials may not be so designated.

55. The fact that all necessary materials may not, however, be so designated, or are otherwise designated, shall not relieve the contractor from furnishing same, the method of designation being employed for convenient reference only and not as an absolute indication of the complete extent of materials necessary.

141. MEASUREMENTS AND EXISTING CONDITIONS.—All dimensions shown of existing work and all dimensions required for new work that is to connect with work now in place shall be verified by the contractor by actual measurement of the existing work.

142. Any discrepancies between the drawings and specifications and the existing conditions shall be referred to the Supervising Architect for adjustment before any work affected thereby has been performed.

152. NEW WORK TO MATCH EXISTING WORK.—New work required or necessary in connection with extending, remodeling, and enlarging the present Post Office Building and in connection with alterations to existing construction of whatever nature, unless shown or specified to the contrary, shall match in all respects corresponding existing work in connection with said building or construction, and the contractor shall secure at the premises all measurements and such other information as may be necessary for compliance with this requirement.

PARAGRAPH 25 OF PETITION

21. Relying entirely on contract drawings, plaintiff procured the fabrication of structural steel to be used in the installation of vaults in the old building, but because the old building had settled, plaintiff discovered upon demolition of the area where the vaults were to be installed that the measurements in the contract drawings for the structural steel to be used in the installation of the vaults were erroneous and that the structural steel that plaintiff had had fabricated would not fit in with the old structural steel already in place.

Plaintiff therefore had to supply additional materials and labor for which it expended $504.09, including 10% overhead and 10% profit. Plaintiff made claim for the $504.09, but the same was rejected by defendant. Plaintiff did not appeal to the head of the department.

The old structural steel that had settled was concealed but it would have been possible, although impractical, for plaintiff to discover such settlement before it procured the new structural steel by cutting holes two inches in diameter in the ceilings of the several floors.

Paragraph 26 of Petition

22. In contemplation of the Post Office rush period during the Christmas holidays of 1933, defendant requested plaintiff to permit some of the Post Office employees to occupy an area in the ground floor of the new building, which of course was still under construction. Such occupation would, however, have been impossible without heat in the area and the heating system in the new building had not been installed.

Plaintiff made an agreement with the defendant's construction engineer and the Post Office Inspector representing the Government on the job to the effect that plaintiff would install temporary steam pipes in the area of the new building to be occupied by the Post Office employees and connect them with the steam pipes in the old building and that the Government would supply the steam during the winter of 1933–34, so that the Post Office employees could occupy the area and the plaintiff would have enough heat in the new building to enable it to do certain plastering in the new building. This arrangement was worked out but not long after the holiday rush was over the Government cut off the steam to the new building and plaintiff did not get to do the plastering. The steam that was used in the new building cost the Government between $3,000 and $4,000, which was more than expected, and the installation of the temporary steam pipes in the new building cost the plaintiff $1,000, for which plaintiff receved no benefit. Defendant refused to pay plaintiff the $1,000.

A strike prevented the plaintiff from doing the plastering as early as it had intended, but there would still have been time in which it could have done the plastering if the agreement had been carried out in full by the defendant.

PARAGRAPH 27 OF PETITION

23. When the plaintiff cut openings in the floor over the basement story of the old building near Elevators Nos. 17, 18, and 19 for the purpose of installing the plumbing required by the contract, it discovered that instead of there being only seven plumbing pipes located in the area as shown by the contract drawings there were actually about 20 plumbing and heating pipes, the greater number of which had to be rerouted in order to install the plumbing equipment in accordance with the contract. Plaintiff rerouted the additional pipes at a cost of $719.83, for which it made a claim on defendant. Defendant rejected the claim. Plaintiff did not appeal to the head of the department.

The pipes in the basement were visible and before plaintiff bid for the contract it would have been possible, although impractical, for it to have examined the pipes in the basement and by tracing them to ascertain that they would be encountered in the area in question.

Defendant based its rejection of plaintiff's claim on paragraphs 147, 148, 149, 150, 151, and 1810 of the specifications which were as follows:

147. ALTERING OF EXISTING WORK.—The contractor shall carry out all alteration work of whatever nature required by the drawings, hereinafter specified or that may be found necessary to fully complete the extending, remodeling, and enlarging required by the contract.

148. Execute all removals and replacements of and repairs to existing work and all new work involved.

149. Utilize the old material removed, which is in good condition, in the new work in the present Post Office Building, wherever possible and acceptable to the construction engineer, unless otherwise specified.

150. Execute all work involved in the changes in arrangement of interior parts indicated; due to changes in pipes, conduits, wiring, ducts, and other existing work; and in the installation of new construction.

151. The contractor shall ascertain whether or not any other work of this nature will be necessary and, if so, the nature and extent of it from the drawings and by examination of the premises, and shall carry out said work.

1810. Remove all piping, ducts, and other work of a mechanical nature necessary to permit the installation of mail and service elevators near column 159, and re-route same as near as may be to the arrangement shown on drawings and in a manner approved by the construction engineer.

Paragraph 28 of Petition

24. In doing the remodeling work in the old building plaintiff discovered that there were three partitions on the first floor, four on the second floor, and five on the third floor which were not shown on the contract drawings but which would have to be removed in order to enable plaintiff to do the remodeling in accordance with the contract drawings. Except for these particular partitions the contract drawings specifically indicated all partitions that would have to be removed.

On June 13, 1934, plaintiff submitted a proposal in the amount of $1,252.23, which was reasonable as to amount, for the removal of the twelve partitions, but the same was rejected on October 11, 1934. Plaintiff did not appeal to the head of the department. Although plaintiff never received a written order from defendant to remove the partitions, it removed them because it had to do so in order to be able to do the remodeling work in accordance with the contract drawings. The rejection of plaintiff's proposal was based on the following paragraphs of the specifications:

173. General.—The exact extent of demolition to be done in order to fully carry out the extending, remodeling, and enlarging may not be fully indicated by the drawings, and can be ascertained only by examination of the premises.

174. The contractor is referred to the drawings and shall ascertain, by comparison thereof with existing conditions, the nature and extent of the demolition that will be necessary for the full and complete execution of the contract.

178. Other Present Structures.—Demolish and remove all parts of the present Post Office and Union Station structures required or necessary to be permanently displaced, or to be taken out and replaced by new work. Also remove parts of such structures which it may become necessary to remove and subsequently replace, or are so required, to permit or facilitate the installation of new work.

Paragraph 29 of Petition

25. On the extreme west side of the second floor of the old building there were some office rooms. Immediately east of them there was a corridor, and immediately east of the corridor there was a cafeteria. The office rooms had wood flooring. The corridor had marble flooring, and the cafeteria had a hard composition flooring called magnesite. The contract drawings (Plaintiff's Ex. 3, plan 7) called for the removal of the partitions so as to make the entire three areas into one large room. The drawings clearly disclosed the existence of the marble flooring in the hall and the necessity of removing and replacing it with wood flooring, but did not disclose the existence of the magnesite flooring in the cafeteria and the necessity of removing and replacing it with wood flooring. The drawings called for "Finish No. 1" in the large room to be created by the remodeling, which under the notes, on the first page thereof, was described as "wood floor."

In making its bid plaintiff, from an examination and study of the contract drawings, thought that the floor of the cafeteria was wood and that it would therefore not have to remove and replace it in order to have Finish No. 1 in the large room to be created by the remodeling, but when plaintiff began the remodeling it discovered the existence of the magnesite floor in the cafeteria. It, therefore, made defendant a proposal, in the amount of $1,395.37 which was reasonable as to amount, for the removal of the magnesite floor in the cafeteria and its replacement with wood flooring. The defendant thought the work was included in the contract and rejected this proposal, but the plaintiff did the work under protest because it had to put wood flooring in the large room to be created by the remodeling in order to

comply with the contract requirements calling for Finish No. 1, i. e., wood flooring, therein. Defendant based its position and its rejection of plaintiff's proposal on paragraphs 1599, 1600, and 1609 of the specifications, which were as follows:

> 1599. GENERAL.—Make the alterations in the existing floors, thresholds, bases, chair rails, picture and wire moulds, and other woodwork involved in any operation connected with completion of the project.
>
> 1600. Work in place shall be removed, altered, extended, etc., as indicated, specified, or necessary.
>
> 1609. The existing wood floors in parts of the present building in which alterations in present construction or installation of new work are required shall be patched and repaired where necessary and left in or restored to good condition, satisfactory to the construction engineer. All worn, splintered, and otherwise defective parts of these floors shall be removed and replaced with flooring which is in good condition and of same character as the existing flooring. When repaired, the floors shall be left smooth, with the upper surface of new parts in same plane as the upper surface of the old parts remaining in place. Note that in present building it will be permissible to lay new partitions on top of present wood floors, as specified under "Brick Work, Hollow Tile Work, etc." However, such floors shall first be put into good condition where necessary.

Plaintiff did not appeal to the head of the department.

PARAGRAPH 30 OF PETITION

26. The contract required the plaintiff to cut through the first floor of the old building an opening 10 feet by 30 feet in area to permit the passage of a conveyor belt equipment with receptacles to carry packages from the mailing platform to the first floor, but the contract drawings failed to show the presence in the area of a 10-inch steam pipe that was in the way and would have to be rerouted, and also failed to show that the structural steel surrounding the opening would have to be reframed. When plaintiff undertook to do the work and found the pipe, it submitted a proposal in the amount of $1,640.73 for rerouting the pipe and reframing the structural steel. Defendant rejected the proposal on the ground that the rerouting of the pipe was a part of

the contract work. Plaintiff protested and submitted a proposal in the amount of $600 for only the reframing, and this proposal was accepted. Plaintiff, under protest, rerouted the pipe because it had to do so in order to make the opening called for in the contract. The reasonable price of rerouting the pipe was $1,040.73, claimed by plaintiff.

Defendant based its position and its rejection of plaintiff's proposal on paragraphs 147, 150, and 151 of the specifications hereinbefore quoted in finding 23, under Paragraph 27 of Petition.

PARAGRAPH 31 OF PETITION

27. The contract drawings provided that the wood block floors in the supply division of the basement and ground floors of the old building were to be laid on existing cement floors, but when plaintiff started to lay the floors it discovered that the cement floors had sinkatures, depressions, and waves in the surface and that it would be necessary to grade, level, and repair the cement floors before laying the wood floors. During the bidding period plaintiff had no opportunity of discovering the condition of the cement floors because the areas were covered with post office supplies.

Defendant ordered the plaintiff in writing to grade, level, and repair the cement floors and agreed to pay plaintiff extra compensation at cost, plus 10%. Plaintiff did the work at a cost of $1,714.09, which was reasonable and fair. Defendant did not pay plaintiff the $1,714.09 in money for the reason that it accepted plaintiff's later proposal to offset the same against a reduction to which defendant was entitled because of the omission of a contract requirement that plaintiff remove certain cement floors and replace the fill and finish on top of the arches, and there is therefore no evidence to support plaintiff's claim.

The material paragraphs of the specifications are as follows:

> 194. FLOOR WORK.—Take up and remove the wood floor, also the wood sleepers and concrete fill thereunder, in main work room of present Post Office Building, preparatory to laying new floor and subfloor construction. This work shall be carried out while post office

business is in progress and in such manner as not to interrupt it.

195. Elsewhere where the present floor surface is required to be changed to another material, the present floor fill shall be removed down to the top of the arch, preparatory to laying the new floor finish. Wood sleepers in any such existing floor fill shall be removed with the fill.

344. Fill under wood floors (including altered or extended floors in present building) shall be leveled off flush with the tops of the sleepers and troweled smooth. Any spaces under the sleepers shall be filled solid with 1 to 3 cement and sand mortar before the concrete fill is placed.

345. Slabs or fill under wood block flooring shall be struck off to a level surface, using screeds not over 8 feet apart. The concrete shall be compacted and floated to an elevation that will bring the tops of the blocks at the finished floor level.

Paragraph 32 of Petition

28. The petitione alleges that the contract was ordered in writing by defendant to furnish and that it did furnish a temporary bridge not required by the contract which cost $45,646.99.

Although the petition has not been amended, plaintiff now asserts a claim for the difference between the alleged cost to it, stated at $36,000, of the bridge that was constructed and the estimated cost of the bridge it proposed to construct which is stated in an uncertain amount, between $8,000 and $10,000.

The specifications provided:

112. Driveways.—Should the manner of conducting the work be such that temporary driveways are necessary to maintain uninterrupted transaction of Government business, the contractor shall provide them.

113. Driveways shall be of wood or other suitable and substantial construction and in all respects satisfactory to the Supervising Architect. They shall be furnished when and maintained in good condition as long as needed.

114. Note that it will be necessary to maintain service of vehicles to present mailing platforms during life of the contract.

In order to construct the new building it was necessary to excavate to a depth of about 40 feet where the driveway, mentioned in finding 2, extended from First Street westward to a point beyond the west end of the loading platform mentioned in said finding. Since it was essential that this loading platform be kept accessible to a large fleet of Government and commercial trucks during the entire period of construction it became necessary for the contractor to erect a temporary facility consisting of a bridge extending from First Street westward to the west end of the loading platform. This was a contract obligation.

The construction of the temporary bridge was subcontracted to the New England Construction Company which defaulted, and it was then constructed by the plaintiff.

At a conference between the representatives of the contractor and the Government about the first of July 1932, the matter of the temporary bridge was discussed. The contractor's representatives suggested that it be constructed by driving piles 50 feet long through the old driveway in bents approximately 12- or 15-foot centers and then placing wood girders, beams, and planks on top of the piles, making the temporary bridge 26 feet wide.

In discussing the method suggested by the contractor's representatives, the Government's representatives objected to it because (1) the elevation would handicap the loading and unloading of Government and commercial trucks at the platform; (2) the 26-foot width would be inadequate for the operation of the trucks; (3) it would not have sufficient strength to carry the required load; and (4) the use and operation of the pile driver necessary to drive the 50-foot piles would hazard the lives of the Post Office employees and interrupt the essential flow of Government and commercial trucks to and from the loading platform.

The diameter of the butts of the 50-foot piles would have ranged from 10 to 24 inches and from some 4 inches to 6 inches at the small end. The use of 50-foot piles was not considered feasible and several reasons were assigned against their use, namely: (1) when driving the smaller end down, it might strike a point of refusal before reaching the proper

depth; (2) if it reached the proper depth, it might not strike a proper point of refusal; (3) skin friction, upon which the pile would in part depend for support would be lost when the earth was excavated around the piles; and (4) there was a hazard in the course of driving the piles of striking footings of the old building and causing damage.

The construction engineer for the Government suggested a method for the temporary bridge construction whereby square timbers 10 feet in length should be used instead of the 50-foot piles and this was acceded to and concurred in by the contractor without protest at any time during the consideration of the method of construction or the period of construction.

The contractor on July 21, 1932, submitted for the first time a plan of construction that had been prepared by the subcontractor and approved by the contractor. It presented three alternates for supports: 10-inch by 10-inch timbers, 8-inch steel beams, or 10-inch piles. This plan was revised several times before it reached its final stage whereby the temporary bridge was actually constructed.

The ultimate plan of construction which was agreed upon and followed is described briefly as follows: The old driveway was chased at right angles thereto and I-beams were placed in the chases flush with the top of the old driveway to accommodate a floor approximately 40 feet in width, continuing the full length of the temporary bridge and built in sections in order to prevent interruption to the ingress and egress of Government and commercial trucks. Instead of piles 50 feet in length, timbers 14 inches by 14 inches, 8 or 10 feet in length were used in bents for the supports of the temporary bridge, placed down to the proper depth. This necessitated that excavations be made in bays, which is the space between bents, to a depth of about 8 feet, the earth bank standing up temporarily to that height. Short posts were set under the cap timbers in a row forming a short bent, a bent extending 8 feet down and resting on mud sills set on the sand. The method was repeated in the next bay, 8 feet deep, while the first bay was lowered to 16 feet, in a sort of step arrangement, and that step arrangement was continued

to the general level of the excavation, traveling westward under this driveway platform which was already in place and in use.

With these several operations the flooring was placed on the cap timbers and carried forward, taking the place of the old driveway as it was removed in these successive operations. By this method of operation, interruption to Government and commercial trucks was reduced to a minimum.

The action of the supervising architect with respect to the construction of the temporary bridge was neither arbitrary nor unreasonable, and it was done in accordance with sound engineering practice. There is no satisfactory evidence to support plaintiff's claim. Plaintiff did not appeal to the head of the department.

Paragraph 33 of Petition

29. The facts were stated in finding 7 under Paragraph 17 (c) of Petition, except that the installation of the hanger rods under the new method cost plaintiff's subcontractor Stephens-Adamson Mfg. Co., which did the work, an additional $1,147.00, for which it made a claim against plaintiff and that plaintiff made claim against defendant for that amount, which claim was refused by defendant. Plaintiff did not appeal to the head of the department.

Paragraph 34 of Petition

30. Plaintiff's subcontractor, Stephens-Adamson Mfg. Co., was ready to start installing the mail-handling equipment in the new building about October 19, 1933. Defendant requested that it be permitted to use, during the Christmas holidays of 1933, the area in the new building where the mail-handling equipment was to be installed but it could not use the area until the cement fill on the floor slab had been laid. This cement fill was to be three or four inches thick.

At the time the subcontractor was ready to start installing the mail-handling equipment it was ascertained that there would be a jurisdictional strike of millwrights, elevator constructors and ornamental ironworkers if any one of these

trades should be permitted to bring the mail-handling equipment from the railroad siding to the Post Office site. The installation of the mail-handling equipment therefore was delayed so that defendant could use the area during the Christmas holidays. Plaintiff went ahead and poured the cement fill on the floor slab without waiting for the mail-handling equipment to be installed, and when the subcontractor later installed the mail-handling equipment it had to chip away or cut through the cement fill in some 200 or 400 small spaces in order to properly fasten the legs of the mail-handling equipment to the floor slab as required by the contract. Because of this chipping away of or cutting through the cement fill the subcontractor made a claim against plaintiff in the amount of $807.81, which was reasonable as to amount, and plaintiff made claim against defendant therefor, which was denied. Plaintiff did not appeal to the head of the department.

In pouring the cement fill plaintiff could have placed temporary blocks or forms in the places where the chipping or cutting later had to be done, and thus have avoided the necessity of the subcontractor having to do the chipping or cutting, but what the cost of this would have been does not appear.

The court decided that the plaintiff was entitled to recover $19,596.38.

Jones, *Judge*, delivered the opinion of the court.

This suit arises out of the construction of a Post Office building in Washington, D. C. By contract dated April 23, 1932, the plaintiff, a corporation with its principal office in Chicago, Illinois, undertook to build an extension to and greatly enlarge the Post Office building near the Union Station. The contract price was $2,999,000.

The old building had wings, three stories high, on the east and the west sides. The wings were connected by a low center covered by a corrugated roofing. On the north side of the building was a loading platform with metal covering. The old building, which was constructed in 1912, had a basement. The north side of the block was vacant except for a

garage which was to be torn down. Here the new building was to be constructed, a three-story affair with basement and subbasement. It was to be connected with and made a part of the old building, which was to be entirely remodeled.

The notice to proceed was received by plaintiff on June 22, 1932. The completion date was to be June 12, 1934, a period of 720 days. During the progress of the work plaintiff was granted extensions of time totaling 362 days, of which 267 days were because of change orders, and 95 days because of strikes, bad weather, and defaulting subcontractors. The work was completed within the contract time as thus extended.

The old building had become badly congested due to the growth of the Post Office activities at Washington.

The specifications clearly provided that the work should be done in such a way as not to interrupt the Government's business, and stipulated that there should be no unreasonable delay or interference in the operations of the Post Office. The contractor was to provide satisfactory temporary facilities to permit such business to be continued during the operations under the contract.

At a conference representatives of the Post Office told the plaintiff it would not be possible to surrender many spaces in the old building and suggested that plaintiff go forward with the construction of the new building so that some of the postal employees could be moved into the new building, which they claimed would permit the remodeling of the old building without interrupting the business of the Post Office. However, plaintiff felt that the only practicable way was to construct the new building and remodel the old at the same time, due to the fact that they were to be joined together and finally finished as one single large building with uniform construction, design, and appearance. It therefore submitted to defendant a schedule showing numerous spaces in the old building that it desired defendant to surrender, the times at which it desired such surrender and the length of time the spaces would be needed.

It was impossible for defendant to surrender a good many of the spaces set out in the schedules without interrupting the business of the post office. In August 1932 plaintiff, at

the suggestion of defendant, constructed as a temporary facility a mezzanine floor, containing 3,200 square feet, in the first floor of the old building. This mezzanine was sufficient to take care of the post office employees working at and near to the north wall in the old building, but was not large enough to take care of the post office employees working in many other spaces in the old building designated in the schedules and possession of which was desired by the plaintiff. The mezzanine was used by the post office employees to its full capacity for two or three months, but by the end of the year its use had dwindled to half capacity, and at the end of 18 months only 20 persons out of a capacity of about 75 were using it. It was not practicable to use the mezzanine for some phases of the work. It could not be used by any unit or postal employees who had to deal with the public. It was not practicable to use it for distribution of the mail. It did enable the defendant to surrender a few of the spaces which plaintiff desired, and defendant surrendered them.

By far the greater part of plaintiff's claim is for damages alleged to have resulted from the failure of the defendant to surrender spaces in the old building so that plaintiff could proceed promptly and efficiently with the performance of the work required by the contract.

However, in the light of the inability of the defendant to surrender many of the spaces in the old building which plaintiff desired without seriously interrupting the business of the Post Office, the evidence to support many of these claims is not satisfactory.

The evidence shows that the Post Office at Washington was one of the busiest and most congested of the post offices in the country, a fact that plaintiff knew at the time it entered into the contract.

Plaintiff claims total damages in the sum of $441,872.60 as a result of alleged long and unreasonable delays upon the part of the defendant in acting upon change proposals, interpreting vague plans and specifications and correcting errors in the drawings, plans and specifications. It is necessary to deny most of these claims since plaintiff did not pursue the remedy clearly set out in the contract.

A number of errors were found in the specifications which required changes and modifications. In some instances the defendant was inexcusably slow in properly interpreting and in acting upon the necessary change proposals. These are set out in the findings and it will not be necessary to repeat them in detail.

On October 15, 1932, plaintiff called defendant's attention to errors in contract drawing P-450 relating to the subsoil drainage system below the subbasement of the new building. The system as specified would have been improperly pitched so that the water would not have been carried off. Defendant did not reply to this letter, and on December 7, 1932, plaintiff submitted a change proposal in the amount of $2,630.54. On January 20, 1933, defendant requested plaintiff to submit a modified proposal with some additional changes. This plaintiff did, but the modified proposal was rejected as excessive. On March 3, 1933, plaintiff submitted another proposal, somewhat modified, which was accepted by the defendant on April 3, 1933. Because of these unreasonable delays plaintiff paid out $254.65 in actual storage charges, which it is entitled to recover. *Arnold M. Diamond* v. *United States*, 98 C. Cls., 543, 551.

One of the first things to be done in the performance of the contract was to underpin the two 60-foot sections of the north wall of the old building in the wings so that the footings for the columns of the new building could be put in at the lower depth required by the subbasement of the new building. The contract contemplated that this underpinning should be done from the inside of the basement of the old building. To do this it was necessary to tear down two 60-foot sections of the north wall and open up the columns thereof so as to connect the weight-carrying steel therein with the steel framework of the new building.

The Government's draftsmen of the specifications overlooked the fact that the electric elevator near column 32 could not do the work of the hydraulic elevator in the north wall near column 35, and when plaintiff asked for the surrender of the hydraulic elevator and machinery thereof near the north wall and column 35 so that it could underpin the north wall in the east wing near First Street, the defendant refused to

surrender it. Finally it was discovered that by extending the use of the Moretrench System the soil could be dried out so that the underpinning of the north wall could be done from the outside. The new plan of underpinning was prepared, submitted and accepted. Plaintiff began the underpinning as soon as the new plan was approved by defendant and finished it March 6, 1933, about two months later than originally planned. The hydraulic elevator near column 35 was not surrendered until October 8, 1933. Since the steam headers connecting the heating system of the new building with that of the old building from which the heat for the new building had to come were to be installed in the area of the basement of the old building where was situated the machinery that operated the hydraulic elevator, the plaintiff was unable to install the steam headers until October 8, 1933, much later than it had originally intended. On account of these delays caused by defendant, as more fully set out in finding 13, the plaintiff was required to keep in operation for an additional 45 days a Moretrench System for which it paid a rental of $700 per month, or a total of $1,050. Necessary operating expenses of the Moretrench System amounted to $1,944 during the 45-day period. Also because of the delay outlined in finding 13, plaintiff was put to an expense of $250 in installing a temporary heat connection to the new building. On these findings the plaintiff is entitled to reimbursement in the sum of $3,240. *Nils P. Severin* v. *United States*, 102 C. Cls., 74, 85.

While the numerous change orders and slowness of the defendant in acting on the proposed and necessary changes caused a great deal of delay in the work, much of it ran concurrently. Taking all these into consideration, however, there was a total over-all delay in the completion of the contract, due to the fault of the defendant, of at least 60 days. The errors of the defendant and its long delay in correcting them, deciding questions and acting upon change proposals delayed the final completion of the contract as indicated.

The overhead of the Washington, D. C. office of the plaintiff chargeable to the Post Office job during such delays amounted to $8,500. After eliminating certain items, the overhead of the Chicago, Illinois, office of plaintiff allocable to

the Post Office job on the basis of the ratio of the monthly gross of the Post Office job to the gross of all jobs being performed by plaintiff during such 60 days amounted to $5,875.

Rental value of a compressor on the job (not included in overhead) during the 60 days was $500, three adding machines $24, and four typewriters $24, making a total of $548.

Insurance expense amounted to $138 during such 60-day period. These items plaintiff is entitled to recover.

Plaintiff submitted to defendant's architects shop drawings for the reinforcing steel rods for the slabs and foundation wall. The architects stamped on these shop drawings the following:

> Approved as to size and type of material. December 16, 1932.

When the rods were about to be installed defendant's construction engineer refused to permit their installation because he thought the rods were not quite long enough to afford a sufficient bearing on the beams. Plaintiff, therefore, had to procure additional steel and splice the rods in order to obtain the length required by the construction engineer, for which plaintiff claims $2,353.52. This claim was denied by the defendant.

This is a close question. However, the specifications applying to this particular matter stipulate that the approval of shop drawings would be general and would not relieve the contractor from the responsibility for proper fitting and construction of the work nor from furnishing materials and work required by the contract which might not be indicated on the shop drawings when approved. The specifications also stipulate that all dimensions shown of existing work and all dimensions required for new work that is to connect with work now in place shall be verified by the contractor by actual measurement.

In view of these provisions of the specifications applicable to this particular claim we reluctantly conclude that plaintiff cannot recover. In addition, plaintiff failed to appeal the adverse decision to the head of the department, as required by the contract. *United States* v. *Blair*, 321 U. S. 730, 735.

The same comment is applicable to the fabrication of structural steel used in the installation of vaults in the old building, as set out in finding 21. The old building had settled, and relying on the drawings plaintiff had fabricated steel which did not fit in with the old structural steel already in place. It was required to supply additional materials for which it claims $504.09. For the same reasons set out in the preceding paragraph we are unable to allow recovery on this item.

In contemplation of the post office rush during the Christmas holidays of 1933, defendant requested plaintiff to permit some of the post office employees to occupy an area on the ground floor of the new building, which of course was still under construction. Such occupation would have been impossible without heat in the area and the heating system in the new building had not been installed.

Plaintiff made an agreement with the defendant's construction engineer and the Post Office Inspector representing the Government on the job to the effect that plaintiff would install temporary steam pipes in the area of the new building to be occupied by the Post Office employees and connect them with the steam pipes in the old building, so that the Post Office employees could occupy the area. The temporary steam pipes in the new building cost the plaintiff $1,000 for which it received no benefit. However, since this agreement was not made by a duly authorized representative of the Government we cannot allow recovery on this item.

When plaintiff cut openings in the floor over the basement of the old building it discovered that instead of only 7 plumbing pipes located in the area as shown by the contract drawings, there were actually about 20 plumbing and heating pipes, the greater number of which had to be rerouted in order to install the plumbing equipment in accordance with the contract. Plaintiff rerouted the additional pipes at a cost of $719.83 for which it made claim on the defendant. However, since the pipes in the basement were visible, and in the light of the specifications set out in Finding 23, we are unable to allow plaintiff recovery on

this item, though there is a measure of justice in the claim. Defendant rejected the claim and plaintiff did not appeal to the head of the department.

In doing the remodeling work plaintiff discovered that there were three partitions on the first floor, four on the second floor and five on the third floor which were not shown on the contract drawings, but which would have to be removed in order to enable plantiff to do the remodeling in accordance with the contract drawings. Plaintiff claims an expense of $1,252.23 for making these changes. In the light of specifications 173, 174 and 175 set out in finding 24, plaintiff is not entitled to recover.

Plaintiff is not entitled to recover on its claim for $1,395.37 for replacing the cafeteria floor, since the type of floor in the cafeteria was clearly visible.

The contract required the plaintiff to cut through the floor of the old building in order to make an opening 10 feet by 30 feet in area to permit the passage of conveyor belt equipment with the receptacles to carry packages from the mailing platform to the first floor. The contract drawings failed to show the presence in this area of a 10-inch steam pipe that was in the way and would have to be rerouted. They also failed to show that the structural steel surrounding the opening would have to be reframed. Plaintiff submitted a proposal in amount of $1,640.73 for rerouting the pipe and reframing the structural steel. Since the pipe was concealed there was no practical way for plaintiff to have discovered it in advance and the drawings did not show its presence. We think, therefore, that plaintiff is entitled to recover the reasonable cost of rerouting the pipe, which we find to be $1,040.73. *Maurice H. Sobel* v. *United States*, 88 C. Cls., 149, 165.

Section 151 of the specifications (having to do with plaintiff's obligations under the contract to make changes in pipes, conduits, wiring, ducts and other existing work) is as follows:

> The contractor shall ascertain whether or not any other work of this nature will be necessary and, if so, the nature and extent of it from the drawings and by examination of the premises, and shall carry out said work.

Clearly since this particular pipe was not only not disclosed by the contract drawings, but was wholly concealed, its removal was not contemplated by either of the parties, and constitutes a new and extra undertaking not covered by the contract itself.

Article 15 authorizes the contracting officer, or his representative, to decide questions of fact arising under the contract. There was no dispute as to the essential facts. They were conceded by both parties. It thus becomes a question of law.

Plaintiff is not entitled to recover on the item set out in finding 27 for the reason that the defendant accepted plaintiff's later proposal to offset such claim against a reduction to which defendant was entitled because of the omission of the contract requirement that plaintiff remove certain cement floor.

The petition alleges that the contractor was ordered in writing by the defendant to furnish and that it did furnish a temporary bridge not required by the contract which cost $36,000.00. It claims the difference between this cost and the estimated cost of the bridge it proposed to construct which is set forth in an uncertain amount between eight and ten thousand dollars, or a net claim of approximately $26,000. We do not believe plaintiff is entitled to recover on this item. Specifications 112, 113 and 114 require that plaintiff shall provide the necessary temporary driveways in order to maintain uninterrupted service of vehicles to the mailing platforms during the life of the contract. The bridge plaintiff proposed to construct by driving piles would have been inadequate and dangerous, and the driving of piles would have obstructed the driveway which had to be kept open. The defendant demanded and secured a safe bridge or driveway at no more cost to the plaintiff than was fair and reasonable.

While there is some measure of merit to plaintiff's claim as outlined in finding 29, and as set out more fully in finding 7, it failed to pursue its remedy in the manner provided under the terms of the contract.

In each of the other items claimed by the plaintiff either the proof of the damages is not satisfactory, or plaintiff

failed to pursue the remedy or to follow the stipulated procedure specified in the contract.

Plaintiff is entitled to recover $19,596.38. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, took no part in the decision of this case.

FIREMAN'S FUND INDEMNITY COMPANY, A CORPORATION v. THE UNITED STATES

[No. 44890. Decided November 5, 1945]

On the Proofs

Government contract; surety on performance bond of defaulting contractor; damage to concrete floors by freezing.—Where plaintiff was surety on the performance bond of a contracting company which entered into a contract with the Government for the construction of 23 buildings, including certain utilities, for Army officers quarters at Aberdeen, Maryland; and where plaintiff, on default of the contractor, took over the contract and completed it through a subcontract with another contracting company; it is *held* that plaintiff is not entitled to recover for the extra cost of replacing certain concrete floors constructed by the prime contractor which had been damaged by water freezing under them, since the evidence satisfactorily shows, and the contracting officer found and decided, that the damage to the floors was not caused by lack of a general drainage system but by the failure of the general contractor, timely and properly, to backfill around the buildings.

Same; evidence.—The evidence does not satisfactorily show that the work of replacing the damaged floors necessarily operated to delay completion of the building.

Same; rental allowances paid to Army officers because of delay in completing quarters.—Rental allowances paid to Army officers in lieu of quarters during the period between the contract completion date and the dates on which the several buildings were completed, accepted and occupied by officers for whose use they were being constructed, were properly charged against plaintiff as a part of the "excess cost occasioned to the Government," within the meaning of article 9 of the contract, by reason of default of the original contractor and failure of plaintiff to complete its work on time. *John M. Whelan & Sons, Inc. v. United States*, 98 C. Cls. 601, and other cases cited.

Same; damages for delay not limited to excess construction costs.—Under article 9 of the contract, when default and delay occur the damages recoverable by the Government are not limited to excess construction costs and direct supervisory costs over the contract price but include any excess costs caused thereby.

Same; decisions not arbitrary nor unreasonable as to temporary heat and supervisory salaries and costs.—It is shown by the evidence that the decisions of the Constructing Quartermaster and the Quartermaster General, from which the plaintiff took no appeal, as to temporary heat and supervisory salaries and costs, were reasonable and were not arbitrary and plaintiff is accordingly not entitled to recover for these items of its claim. See *Austin Engineering Co., Inc.* v. *United States*, 97 C. Cls. 68.

Same; improper deduction of taxes due by prime contractor in final settlement with surety.—Where upon final settlement with plaintiff the Comptroller General found that the defaulting prime contractor was indebted to the Government for income tax and interest and deducted the amount of tax and interest from the balance otherwise due to plaintiff under the terms of the original contract; it is *held* that the charging of this tax and interest to plaintiff and the deduction of it from the amount due plaintiff, as surety on the bond for completion of the contract work, were improper, and plaintiff is entitled to recover. *United States Fidelity and Guaranty Co.* v. *United States*, 92 C. Cls. 144.

The Reporter's statement of the case:

Mr. Bernard J. Gallagher for plaintiff. *Mr. Louis Rosenberg*, *Mr. Herbert M. Rosenberg*, and *Mr. Irwin H. Rosenberg* were on the brief.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff seeks to recover $15,213.04 under a contract with defendant. It is claimed that defendant breached the contract in requiring plaintiff to replace certain damaged concrete floors at a cost of $5,059.61, and in refusing an extension of time of thirty days therefor; in deducting, as excess costs occasioned by delayed completion, the amount of $3,624, rental allowances paid to certain Army officers; in charging other supervisory costs for a period of thirty days after the contract completion date, for which period an extension should have been granted; in refusing to accept building No. 9 as substantially completed on December 31, 1935; and in requiring plaintiff to furnish temporary heat after De-

cember 31, and in deducting from the amount otherwise due plaintiff under the contract the sum of $901.18 for an income-tax liability for 1933 of the defaulting prime contractor.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. March 27, 1934, the C. & W. Construction Company, Inc. (hereinafter sometimes referred to as "the C. & W. Co.") entered into a contract with the War Department, through the Quartermaster General as contracting officer, for performing all labor and furnishing all materials for the construction of 23 buildings consisting of Field Officers' Quarters, Company Officers' Quarters, and Bachelor Officers' Quarters and Mess, including utilities thereto, at Aberdeen Proving Grounds, Aberdeen, Maryland, for the lump sum of $476,900. Surety bond in the amount of $240,000 for faithful performance of this contract was furnished by the Fireman's Fund Indemnity Company, Inc., a California corporation, plaintiff herein (for convenience sometimes also hereinafter referred to as surety).

2. The total contract price as increased by change orders was $478,161.10. The work was to be commenced within 10 days after receipt of notice to proceed, and be completed within 400 days thereafter. Notice to proceed was received March 31, 1934, thereby establishing May 13, 1935, as the date for completion of the contract. By change orders the completion date was extended to September 8, 1935. None of the buildings was completed until long after this date.

3. Work was commenced by the contractor shortly after notice to proceed was received, and was prosecuted by it until February 8, 1935, when it abandoned the contract work. On February 8, 1935, Captain M. A. McFadden, the Constructing Quartermaster (hereinafter referred to as the "Quartermaster") who was in local charge of the contract work for the defendant, notified the surety by telegram that the contractor had stopped work on the contract. February 21, the Quartermaster, by both a letter and a telegram, notified the surety that the contractor had definitely abandoned the contract work, and requested advice as to whether the surety desired to complete the contract for its principal. The surety responded by telegram on the same day advising that appro-

priate action would be taken upon receipt of advice that the contractor had been declared in default. February 23, 1935, the Quartermaster advised the surety by letter that the right of the C. & W. Company to proceed with further work under the contract had been terminated, and furnished the surety with a copy of this notice of termination. This letter further stated:

> The exact status of the unfinished work can be ascertained from the Constructing Quartermaster at the Aberdeen Proving Ground. In the event you do not elect to complete the work the Government proposes to complete it for your account, and if any excess cost be incurred thereby the Government will look to the performance bond for recovery.

4. March 12, 1935, the surety advised the Quartermaster General that it had about completed negotiations to finish the contract work, but in order to satisfactorily close the negotiations it was necessary that it be advised (a) as to the papers to be executed in taking over the contract, (b) whether the execution of the papers would insure the same monthly payments to the surety as would have been made to its principal, and (c) whether the final estimate would be paid to the surety upon completion of the work.

The Quartermaster General in letter dated March 14, 1935, responded to the surety's inquiries as follows:

> (1) What papers will be necessary to execute in the event of our taking over the contract?
>
> (a) This office should be advised in writing that the Fireman's Fund Indemnity Company, Surety on the performance bond of the aforementioned contract, will complete as Surety the unfinished work of the said contract. When this is done the Surety may start work immediately.
>
> (2) Will the execution of such papers by us, insure payment of monthly estimates to us the same as would have been paid to our Principal?
>
> (a) For work performed by the Surety partial payments will be made to the Surety on the performance bond of Contract No. W 6265 qm-24 in accordance with Article 16 of the said contract.
>
> (3) Will the final estimate be paid to us upon completion of the work?
>
> (a) Upon satisfactory completion and acceptance of all work called for by the contract and presentment of

proof of expenditures by the Surety, a final payment voucher will be stated in favor of the Surety for all moneys due the Surety under the said contract and forwarded to the General Accounting Office for final settlement. Your attention is invited to the decision of the Comptroller General, Volume 8, Page 435—February 12, 1929, A-24850. * * *

5. By letter of March 16, 1935, the plaintiff stated that it would complete the unfinished portion of the contract, and that its representative, the Wilaka Construction Company of New York City (hereinafter referred to as "Wilaka" or as "Wilaka Co."), would send its representative to the site of the work on March 18. On the same date plaintiff entered into a contract with the Wilaka Company for the completion of the contract for $166,156.70. The contract provided that Wilaka was to acquire title to and use all materials, tools, equipment, and shanties left on the job by the defaulting contractor, and that in the event the materials on the site which had not been incorporated into the structures (exclusive of plumbing materials and plumbing equipment, as well as the tools, shanties, scaffolding, etc.,) should exceed $3,500, such excess would be acquired by Wilaka at its own expense.

March 22, 1935, plaintiff inquired of defendant as to the exact amount still remaining in the original contract and, on March 26, the Quartermaster replied as follows:

The present status of this contract is as follows:

	Increase	*Decrease*	
Original Contract Price			$476, 900. 00
Change Order A		$601. 74	
Change Order B	$250. 60		
Change Order C	No Change	No Change	
Change Order D	165. 79		
Change Order E	No Change	No Change	
Change Order F	31. 47		
	447. 86	601. 74	
		447. 86	
Net Decrease			153. 88
Net Amount of Contract			476, 746. 12
Payments made to C. & W. Construction Co			311, 737. 21
Balance Remaining			165, 008. 91

April 5, 1935, the plaintiff requested and authorized the Quartermaster to make arrangements direct with the Wilaka Company with respect to plans, specifications, approval of material and construction of the work.

6. Plaintiff commenced, performed, and completed the work through Wilaka, which work was finally accepted as complete by defendant on March 20, 1936, for which plaintiff claims to have incurred and paid out a greater sum of money than the $165,008.91 as set forth in the letter of March 26, 1935, of the defendant to plaintiff (see finding 3).

7. In its petition plaintiff claimed $20,367.80, but now claims and seeks to recover $15,213.04, made up of the following items:

(1) Replacing certain concrete floor slabs	$5,059.61
(2) Excess costs deducted by the defendant from balance due plaintiff	4,104.57
(3) Deduction by defendant for officers' quarters due to delay by plaintiff in completing buildings	3,624.00
(4) Temporary heat	1,523.68
(5) Deduction of tax liability of C. & W. Co	901.18
Total	15,213.04

8. Art. 15 of the contract provided, so far as material here, that "all disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions."

Claim for cost of replacing concrete floors

9. The concrete floors of buildings 4, 9, 10, 20, 21, 22, and 28 were severely damaged by freezing temperatures occurring during the latter part of January or the first part of February 1935 while the original contractor was performing the contract work. Water had gotten under the floors and had frozen, causing the floors to buckle and break. Defendant required the plaintiff, as surety, to replace the damaged floors at its own cost.

10. Defendant's quartermaster made an investigation about February 4, 1935, and determined that the damage was caused by an accumulation of surface water under the concrete floors which, during the cold-weather period, especially the last few days of January and the first few days of February 1935, had frozen and, due to the expansion under the floors, caused the concrete to bulge and crack. He also determined as a fact that the cause was the failure of the C. & W. Co., properly to backfill around the exterior of the walls of the building. This finding was subsequently, on the protest and appeal by plaintiff, approved by the contracting officer and the Secretary of War.

February 7, 1935, the Quartermaster wrote the C. & W. Company advising it of this situation, quoting applicable paragraphs of the specifications, namely, G–C 4, G–C 15, G–C 20, and G–C 28, and directed this contractor that all damaged work be placed in first class and satisfactory condition, as required by the contract and specifications. No reply was made to this letter by the C. & W. Company.

Again on February 12 the Quartermaster wrote the C. & W. Co., calling attention to the previous letter of February 7, and also advising that it had failed to comply with the above-mentioned instructions and directed the company to provide and maintain heat in all buildings during cold or wet weather as provided for in par. G–C 15 of the specifications.

11. April 23, 1935 the Quartermaster wrote plaintiff as follows:

> The following concrete floors have been damaged to such an extent that complete replacement is necessary:
> Bldg. #4 Basement Floor.
> Bldg. #9 (b) Corridor floor East Wing.
> (d) Corridor in main building at foot of stairs.
> Crack extending approximately 20 ft.
> (g) Ladies Locker.
> (h) Ladies Shower.
> (i) Store Room: West of Stairs 2.
> (j) Corridor between stores and Ladies Locker.
> (k) Men's Locker and Toilet.
> Bldg. #10 Basement Floor.

Bldg. #20 (b) Basement Floor.
Bldg. #21 Basement Floor.
Bldg. #22 Basement Floor.
Bldg. #28 Basement Floor.

The balance of the floors that are cracked slightly may possibly be repaired satisfactorily. It is suggested that you make repairs to one of these floors and advise this office when it is ready for inspection.

May 7, 1935, plaintiff, through the Wilaka Co., responded as follows:

> Pursuant to your letter of April 23, 1935 giving us list of damaged concrete floors that require complete replacement, please be advised that we are proceeding with this work accordingly.
>
> However, we feel that the damage was caused by condition for which the General Construction Contractor should not be held responsible. Had the subsoil drains been connected to the storm water drains the damaged conditions would not have occurred.
>
> We thus request an extension of time of 20 days for the completion of our contract due to the above additional work required and that consideration be given us for remuneration for the additional work.

May 9 the Quartermaster acknowledged the letter of May 7th, quoting specifications, paragraphs G–C 4, 10, 15, 20, 24 27, 28, pars. 3 and 4, page 8, and par. 5, page 9, advising that—

> Reference * * * letter of Wilaka Construction Co., May 7, 1935, requesting additional compensation and additional time on account of damaged concrete floors in Officers' Quarters, and the Bachelor Officers' Mess Building.
>
> The following quotations are from Specifications #9988–D dated February 17, 1934, for the construction of Field and Company Officers' Quarters, and #9942–D, dated February 15, 1934, for the construction of Bachelor Officers' Quarters and Mess: * * *
>
> Letters from this office to the C. & W. Construction Co., dated August 10, 1934, August 21, 1934, August 31, 1934, October 1, 1934, and October 17, 1934, called attention to the requirements of the specifications, and directed that, material and work be protected, water be kept out of excavations, subsoil drains be installed. waterproofing be completed, backfill be made, etc.

Letter from this office February 7, 1935 to C. & W. Construction Co. advised them of certain damage that had occurred to the buildings due to their failure to comply with the specification requirements, and instructions from this office and letter February 12, 1935 to C. & W., copy of which was forwarded to the Surety on the Performance Bond, directed attention to previous correspondence regarding damaged work, and directed that heat be maintained in all buildings during cold or wet weather.

The damaged condition of the concrete floors was called to the attention of the representative of The Fireman's Fund Indemnity Co. of California, the Surety on the Performance Bond, and to all contractors who called at this office prior to submitting bids to the Surety for completion of the work.

The damage to the concrete floors is entirely due to the Contractor's failure to comply with the requirements of the specifications, and instructions issued by the Constructing Quartermaster. The Surety on the Performance Bond under the terms of the Standard Form of Performance Bond has elected to complete the contract, and is therefore obligated to "well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract."

Your request for remuneration and twenty (20) days extension of time for replacing damaged concrete floors cannot be considered, and is disapproved.

The Wilaka Company, by letter of May 15, excepted to the ruling of the Quartermaster.

12. May 23, 1935, the Quartermaster advised plaintiff in writing that in accordance with Art. 15 of the contract the correspondence in this case had been forwarded to the Contracting Officer for his decision, and that the Quartermaster General (the contracting officer) on May 21, 1935, made the following decision:

It is, therefore, the opinion of this office that the contractor's request for an extension of time does not come within the provisions of Article 9 of the contract and as it was especially required to keep its excavation free from water as required in Paragraph 3, Page 8 of the specifications, any delay that it may have sustained as a result of the flooding of the basements was its own fault. The contractor's request for an extension of time is, therefore, disallowed.

13. June 21, 1935, an appeal was taken by plaintiff through its representative, the Wilaka Co., to the Secretary of War from the decision of the Constructing Quartermaster and of the Quartermaster General. Pertinent parts of this appeal read:

> As part of the General Construction Contract, Sub-Soil Drains are required to be installed along the footings of the various buildings and to be extended approximately 5 feet from the building, the point of discharge to be as directed by the C. Q. M.; for the Bachelor Officers' Quarters, the sub-soil Drainage to be connected to storm water drains. The storm water drains were to be a separate installation under a future Contract by others, with the War Department.
>
> The purpose of a sub-soil drainage system is to intercept underground water and keep the water from getting under the building, walls, footings, floors, etc., at all times and after a building is completed and occupied. The purpose cannot be accomplished unless the sub-soil drainage pipe lines are promptly connected to storm water lines. On this project the storm water lines were not installed and were not available at the time the sub-soil drains were put in as part of the General Construction. The sub-soil drainage systems lay unconnected to the future storm water lines, during the winter period. There was absolutely no way of arresting the underground water from finding its way under the concrete basement floors on ground of the buildings. The freezing of ground during the winter permitted the underground water to build up pressure heads, thereby fracturing and damaging the floors.
>
> The General Construction Contractor's obligation to install the sub-soil drainage systems was carried out as far as was possible. The obligation of the War Department to let the contract for the installation of the storm water lines was delayed. This was the direct and true cause of the damage to the floors for which we appeal to you and ask for your consideration.
>
> * * * The damage was not caused by the General Contractor's neglect to properly protect the work but was caused, as stated above, by failure on part of the War Department to install the storm drains at proper time so that the sub-soil drains could be connected to the storm drains.
>
> * * * the General Construction Contractor's obligation was carried out as far as it could be. The subsoil

drains were installed. The storm drains were not installed on time. * * *

As to Items (h), (i), & (k) *Excavating, Backfilling & Grading*, respectively. This work was performed by the General Contractor according to requirements. The fact still remains that the subsoil drains were installed but could not be connected by others to the future storm water pipe lines, thus causing damage.

Despite the fact that the damaged condition of the floors was called to the attention of the General Contractor, the Firemans Fund Indemnity Co. and to the contractors who submitted bids to the Surety Co. for the completion of the work, we must repeat again that the damage in question was not due to the General Construction Contractor's neglect to comply with the requirements of the Contract obligations but rather to the neglect in letting of separate contract on time, for the installation of the storm drain lines and the connecting of subsoil drains to the storm drains. * * *

We hereby take exception to the above decision and appeal to you for reconsideration.

In the decision of the Quartermaster General, reference is made to Paragraph 3, Page 8, of the Specifications requiring that during progress of the work excavations shall be kept free from water and maintained in position, etc.

This applies to Excavation in general and not to condition after the basement floors are installed and the backfilling is in place or in connection to subsoil drainage system. The flooding of the basements referred to above was not during excavation, but the damage of the basement floors was caused by water getting beneath the basement floors.

The storm water drains which were installed by others at later date and not being available at the proper time and the subsoil drains not being connected by others to the storm water drains defeated the very purpose of the subsoil drainage system. The subsoil drains without proper connection to the storm water drains could not properly intercept ground water.

In the Quartermaster General's decision no mention of the remuneration for replacing of the damaged floors is made.

As stated in our letter of May 7, 1935, the damaged floors are being replaced by us.

With the above facts before you, we respectfully request that you reconsider the matter and trust that you will find that we are justly entitled to remuneration for the removing and replacing of the damaged floors and

that you will grant us the requested 20 days extension of time for completion of our contract.

After consideration of the appeal and the record, the Secretary of War ruled on plaintiff's appeal in a letter of August 9 as follows:

> Your letter of June 21, 1935, * * *, wherein you protest against the ruling made by the Contracting Officer, communicated to you by letter dated May 23, 1935, from the Constructing Quartermaster, has been reviewed by this Department in accordance with Article 15 of your contract.
>
> After carefully considering all the facts presented it is the opinion of this Department that under the terms of Contract No. W-6265-qm-24 additional compensation and an extension of time for alleged extra work performed by you, because of damage to the basement flooring of the buildings caused by freezing and lack of proper drainage facilities cannot be granted. The decision of the Contracting Officer is sustained.

14. Long prior to abandonment of the contract by the C. & W. Co., the Quartermaster wrote the C. & W. Company the following letter:

* * * * *

> An inspection was made today of the work being undertaken by you and the following unsatisfactory conditions were found:
>
> (a) Water standing in basements of Buildings No. 4, 7, 8, 10, 15, 20, 21, 22, 23, 24, 31, 32, 33 and 34 as the results of rains which occurred August 2, 1934.
>
> (b) Excavation around footings of basement walls of Buildings No. 20, 21, and 22 not backfilled, and filled with water.
>
> (c) Area in rear of Buildings No. 26 and 27 in very unsanitary conditions as the results of employees eating lunches and throwing food containers on the ground.
>
> (d) Latrine in the rear of Building No. 25 in a most unsanitary and unsatisfactory condition.
>
> (e) Interior of Buildings No. 25, 26 and 27 cluttered up with stone, lumber and debris.
>
> (f) Trees adjacent to buildings being damaged by material deposited against them not properly protected.

(g) Water hose leaking and wasting water due to absence of necessary washers.
(h) Lights at barricades not lighted every night.

All of the above items have been called to the attention of Mr. Gove, on a number of occasions by the inspector of the job, but no action has been taken to correct deficiencies. It is directed that

(a) All latrines be thoroughly cleaned today and maintained in sanitary conditions at all times.
(b) All water in basements and around footings be pumped out immediately, and the work properly protected from damage at all times.
(c) All other items mentioned be taken care of promptly as required by specifications and the contract.

Again on August 21, 1934, the Quartermaster wrote C. & W. Company as follows:

> Letter this office dated August 10, 1934 directed that "All water in basements and around footings be pumped out immediately, and the work properly protected from damage at all times."
>
> Water is still standing in a number of basement excavations, which is not only a detriment to the structure but provides breeding places for mosquitoes.
>
> It is directed that you immediately remove all water from basements and around footings and take necessary action to insure that the water is removed from all excavations after each and every rain.

August 30, 1934, C. & W. Company wrote the Quartermaster as follows:

> Several of the officers' qtrs. are now dampproofed, subsoil drain laid, and backfilled in accordance with our contract, and due to subsoil drains not being connected to any outlet, water stands around bldgs. and keeps cellars in such a wet condition, it is impossible for us to lay cellar floors and install boilers.
>
> We ask that these subsoil drains be connected as soon as possible, so that this condition can be relieved, and we be allowed to proceed with our work.
>
> We will not be responsible for any delay or damage caused by this condition.

August 31, and October 1, 1934, the Quartermaster again wrote the C. & W. Co., calling attention to the unsatisfactory

condition of the work and directing the contractor to take steps to comply with the specifications.

Again on October 17, 1934, he wrote the C. & W. Co., the following letter:

> Letters from this office dated August 10, August 21 and October 1, 1934, called your attention to unsatisfactory conditions existing on your work, and directed that necessary corrective action be taken by you.
>
> The undersigned personally inspected all of the buildings under construction by you today accompanied by your Mr. Wilkie and Mr. Gove, Mr. Minor and Mr. Cannon of the Constructing Quartermaster's organization and found the following unsatisfactory conditions still existing:
>
> a. Backfill of walls incomplete, Buildings No. 21, 22, 31, 27, 26, 25, 24, 23, 20, 15 and 10.
>
> b. Foundation not adequately protected from drainage of adjacent areas, Buildings No. 5, 6, 7, 8, 9, 22, 30 and 31.
>
> c. Water in cellars, Buildings No. 4, 8, 30 and 32.
>
> d. Rubbish in building causing fire risk, Buildings No. 23, 24, 25, 26, 28, 30 and 31.
>
> e. Rubbish around exterior of building causing fire risk, Buildings No. 25, 31, 32, 33, 34, 27, 26, 24 and 23.
>
> It is requested that you advise this office immediately when you contemplate correcting all of the unsatisfactory conditions noted.

15. The provisions of the specifications which relate to all buildings except No. 9, provide with respect to subsoil drains:

> P-11. Sub-Soil Drain.—Sub-soil drain shall be installed along the footings and drainage shall be extended to approximately 5′ from building, the point of discharge shall be as directed by the C. Q. M.
>
> The subsoil shall be constructed with 4″ drain tile, laid with open joints, the joints shall be covered with pieces of tar paper or burlap. Crushed stone including all backfill shall be as specified hereinbefore under the General Section of these specifications.

The pertinent provisions of the specification relating to Building No. 9 read:

> P-12. Sub-Soil Drain.—Sub-soil drain shall be installed along the footings and it shall be connected to storm water drain.

The sub-soil drain shall be constructed with six (6) inch porous drain tile, laid with open joints. The joints shall be covered with pieces of tar paper or burlap. The drain shall be covered with crushed stone and the trenches backfilled as specified under the General Section of these Specifications.

16. The original contract provided, among other things, for the laying of subsurface drains at the buildings and to extend 5 feet from the buildings. These drains were to be connected to a general drainage system which was to be installed by another contractor.

17. A separate contract for the construction of a water distribution system, sanitary sewer system, and storm sewer system, except buildings 9 and 10, was entered into between the defendant and the Marino Contracting Company on July 17, 1934. This contract provided that the work was to be completed within 120 calendar days after receipt of notice to proceed. In addition to the buildings covered by the contract in suit, except building 10, the contract covered a number of buildings constructed under other contracts. Notice to proceed was received by Marino July 24, 1934. The date fixed for completion was therefore November 21, 1934. By change orders issued pursuant to the terms of the contract, the completion date was extended 123 calendar days, or to March 24, 1935. These change orders were occasioned by changed conditions encountered during the progress of the work, including subsurface and latent conditions.

18. No reference is made in the contract, specifications or drawings for the buildings and facilities, which the C. & W. Company agreed to construct and install, as to when the general drainage system would be installed, nor when the connections from the various buildings were to be made. No such information was furnished by the defendant to the C. & W., nor to any of plaintiff's employees. However, the two contracts for the general drainage system with the Marino Company and the contract with the C. & W. Company were actually carried on practically contemporaneously.

19. Work under the contract with Marino for the drainage system had commenced in July 1934 and during the late summer and fall and into the winter this contract work

had been carried along with reasonable efficiency and excavations for the drainage system and the laying of the pipes for the drainage system as outlined above had been carried on. The Marino Company was delayed to a considerable extent by the C. & W. Company.

20. Actual connections were made to the subsoil and cellar drains as follows:

Building No. 4: The cellar drains from this building emptied into an independent storm sewer drain and they were connected November 3, 1934. The subsoil drains, together with the downspouts from the roofs, were connected December 18, 1934.

Building No. 9: The subsoil drains and cellar drains were connected to a storm sewer at the rear of the building on October 31, 1934. The cellar drains and subsoil drains at the front of the building emptied into separate storm sewers and, with the exception of two drains, they were connected October 30, 1934. The two drains which were not connected came out under scaffolding which had been left by the contractor, making it impracticable to make the connection until March 16, 1935.

Building No. 10: The storm sewer connections were made at this building April 16, 1935.

Building No. 20: The drains from the storm sewer emptied into a creek at the rear of the building. The cellar drains, storm sewer drains, and subsoil drains were connected January 18, 1935.

Buildings Nos. 21 and 22: The cellar drains, subsoil drains, and storm sewer drains were connected January 19 and 21, 1935.

Building No. 23: The subsoil drains and cellar drains were connected to the sanitary sewer system October 12 to 24, 1934.

21. Long prior to the time that the concrete floors were damaged, the Quartermaster had on many occasions complained both orally and in writing to the C. & W. Co., about its failure to completely backfill around the buildings, about water entering the basements, and the failure of the contractor to remove it promptly; and about rubbish piled up on the outside of the buildings which interfered with the construction of the storm sewer and water system. Although

the C. & W. Co., actually did some backfilling, the backfilling was incomplete and improperly done, resulting in water coming around the buildings and finding its way under the floors of the basements where it froze and caused the concrete floors to buckle and break.

22. The concrete floors were damaged as a result of low temperatures occurring during the latter part of January and early part of February 1935. During the period of January 27 to February 2, 1935, the mean temperature at the site of the work varied from 12° below zero to 19° above, and the inspection of the buildings on February 4, disclosed that the floors in buildings 4, 9, 10, 16, 20, 21, 22, 24, and 28 were damaged, requiring replacement in some and repairs in others. The proof is unsatisfactory to show that heat was maintained at all times in some of the buildings in which damage occurred. In the other buildings constructed by the C. & W. Company, which were in substantially the same status of completion as those in which the concrete floors were damaged, some of the subsoil and cellar drains had been connected to a general drainage system and no damage occurred as the result of the freeze referred to in finding 22 and in other buildings where no connection had been made, no damage to the concrete floors occurred.

23. Final completion of the last of the connections to the drainage system was during April 1935. Backfilling and grading of excavations and replacement of the damaged concrete floors was completed prior to the winter season of 1935–36. No damage to floors is shown to have occurred subsequent to the occasion mentioned herein.

24. The fair and reasonable cost of removing and replacing the damaged concrete floors was $3,731.50, and required approximately 30 days' time.

25. The decision of the Contracting Officer requiring plaintiff to replace the damaged floors was made in good faith and was not arbitrary or capricious.

Claim for Refund of Excess Cost Deducted From Payments to Plaintiff for Delay in Completion

26. The defendant deducted from payments to plaintiff the sum of $7,811.62, representing increased inspection and super-

visory costs incurred as a result of plaintiff's failure to complete the contract by September 8, 1935, the date fixed for its completion.

27. Art. 9 of the contract provided that in the event the original contractor defaulted and the Government completed the work by contract or otherwise, "the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby."

Art. 15 made the decisions of the contracting officer and the head of the Department final on all disputes arising under the contract.

28. The buildings other than No. 9 were accepted on the following dates:

Building Numbers:	Date
4, 5 & 6	December 13, 1935
7 & 8	December 6, 1935
10	December 27, 1935
15	December 19, 1935
20	December 23, 1935
21	December 27, 1935
22	December 30, 1935
23	November 12, 1935
24	November 8, 1935
25 & 26	November 7, 1935
27	November 1, 1935
28	November 22, 1935
29 to 34, inclusive	November 29, 1935

29. Plaintiff's progress in performance of the contract work was slow and continued slow even after September 8, 1935, the contract date for completion of the work. None of the buildings had been delivered to defendant on that date. The question of lack of progress was made the subject of correspondence between the Quartermaster and plaintiff commencing as early as July 1935. On July 8, 28, 30, August 22, September 11, 19, 28, October 17, November 27, December 20 and 27, 1935, letters were written by the Quartermaster to plaintiff complaining about unsatisfactory progress, and the manner in which work was being carried on, and requesting that the buildings be completed without further delay. The evidence does not establish that any of the buildings were in a satisfactory condition for acceptance at a date earlier than that on which the building was accepted.

Plaintiff on numerous occasions prior to the dates the buildings were accepted orally notified the Quartermaster that certain buildings were ready for inspection and acceptance. Inspections were promptly made and they disclosed that the buildings were not completely finished. Subsequent inspections made disclosed that many of the items previously pointed out to plaintiff had not been finished.

Between September 8, 1935, and the various dates on which the buildings were accepted, many items remained to be completed, consisting chiefly of correcting defective floors; painting interior; installing hardware and millwork; repairing plaster; adjusting plumbing; laying, sanding, and finishing floors; adjusting heating equipment; and other similar items, many of which constituted initial as well as corrective work.

On many occasions, subsequent to September 8, 1935, the Quartermaster urged plaintiff to complete the buildings in order that they might be accepted and occupied at the earliest possible date. October 17, 1935, subsequent to the contract completion date, the Quartermaster advised plaintiff that if it did not take action to complete the contract, appropriate action would be taken under the performance bond, and stated:

> Your representative, the Wilaka Construction Company, assumed actual management of the project March 18, 1935.
>
> At that time (March 18, 1935) the entire project was approximately sixty-eight per cent (68%) completed, and of the total of twenty-three (23) buildings included in the contract there were eleven (11) buildings which were then approximately eighty per cent (80%) completed.
>
> Your representative has now been on this project seven (7) months and not one of the buildings has as yet been completed in accordance with contract requirements.

On November 1, 1935, ten buildings were nearly completed and the remaining work required could have been performed within a few days. The Quartermaster especially urged that these buildings be completed so that they could be occupied by November 6 or 7. This request was not complied with by plaintiff.

30. November 30, 1935, plaintiff's Vice-President Lazere, at the request of the Quartermaster, visited the project. The Quartermaster pointed out the unsatisfactory manner in which work was being carried on. Lazere admitted that there was room for improvement and promised to issue instructions promptly to his superintendent to change the procedure then followed so as to expedite completion. Thereafter no improvement was made in plaintiff's progress. Plaintiff's superintendent, upon being questioned concerning instructions issued by Lazere, stated to the Quartermaster that he had received no such instructions.

31. December 20, the Quartermaster advised plaintiff that during the period November 1, 1935 to date, 18 officers' quarters had been delivered and had been accepted, subject to exceptions on each building as to incomplete items to be promptly finished, but that all the corrections had not yet been made.

32. A contributing factor to plaintiff's delay in completing the items shown on the various punch lists was that Wilaka, plaintiff's contractor, had sublet all work under the contract, except the stone, concrete and masonry work, to a number of contractors and had failed to coordinate the work or did not have such control over the various subcontractors as it would have had if it had performed the work itself. Plaintiff's superintendent relied upon the subcontractors to complete the work shown on the lists of incomplete work furnished by the Quartermaster, instead of checking the items personally and seeing that the work was promptly done. Complaints were frequently made by the Quartermaster to plaintiff against the Wilaka Company's lack of progress and complained of the superintendent's failure to expedite the work, and finally, about March 6, 1936, the superintendents who had been engaged on the work since March 1935, left or were removed, and one Gene Hall, a former representative of plaintiff, was placed in charge of the work by the Wilaka Co. Promptly after Hall assumed charge he made diligent efforts to complete the contract promptly, and as a result the contract was, as hereinbefore stated, completed on March 20, 1936.

33. At the time of acceptance of the 22 buildings (all except No. 9) several items of corrections and omissions remained to be completed. These items consisted in general of touching up paint; fitting doors; installing door stops; installing chains on lighting fixtures; installing pipe hangers; replacing broken sash; adjusting toilets; stopping leaks in buildings; installing rods in clothes closets; installing shower curtains and shower curtain hooks; installing window locks; replacing broken glass, and general cleaning, etc. These 22 buildings were accepted before they were fully completed and the officers for whom the buildings were constructed moved into them shortly after the buildings were accepted. The buildings were accepted with the understanding that the incomplete items would be finished promptly after acceptance. Although the acceptances were conditioned upon prompt completion of remaining items, plaintiff was slow in completing the buildings. As a result of plaintiff's delay, the Quartermaster wrote plaintiff on December 20, 1935, complaining about its failure to complete buildings including one that had been taken over as early as November 1, 1935. This letter reads:

> During the period from November 1st, 1935 to date a total of eighteen (18) officers' quarters have been delivered by you. This office in accepting these eighteen (18) buildings made certain exceptions on each building to items which had not been completed in accordance with contract requirements and obtained a signed statement in each case from your representative that the necessary corrections would be made immediately, and included a list of all exceptions in letters to you.
>
> To date all of the corrections have not yet been made. As there has been ample time since November 1st, 1935 the date the first building was delivered to have completed all corrections, it is requested that you complete all of the listed items without further delay and advise this office when it has been done.
>
> Attention invited to the fact that it is absolutely necessary that all excepted items be completed satisfactorily before this office can execute the final payment voucher on this contract.

34. No written protest was made by plaintiff against the action of the Quartermaster, according to the terms of Art.

15 of the contract, as to the acceptance of any of these buildings within the time required by the specifications. The letter of protest relied upon by plaintiff is dated March 25, 1936, written by plaintiff in connection with the final payment voucher, contains the following statement:

> * * * and upon receipt of this amount we will have no further claim against the United States Government arising under and by virtue of this contract, except that we reserve the right to file claim for reimbursement as follows: * * *

The action of the defendant's Contracting Officer in connection with the completion and acceptance of these buildings was not arbitrary or capricious.

35. The last building completed was No. 9, which was completed and accepted March 20, 1936. A few days prior thereto, on March 16, 1936, plaintiff by letter to the Quartermaster requested acceptance of this building. Promptly upon receipt of this letter an inspection was made by the Quartermaster and his force, and a number of items were found incomplete as hereinafter set forth in detail. These items were completed by March 20, 1936, when the building was accepted. On March 20, 1936, the day building No. 9 was accepted, a final coat of paint was applied to one end of a second floor porch, and to an assembly room door. Also, a pressure-stat was installed and defects in the heating system were corrected.

On February 6, 1936 a previous written request for acceptance of building No. 9 was made. During January 1936, and on several occasions prior thereto, plaintiff orally requested that building No. 9 be accepted.

Promptly after receipt of the letter of February 6, 1936 requesting acceptance of building No. 9, an inspection was made. This inspection disclosed many incomplete items. Lists setting forth the items remaining to be completed were furnished plaintiff's superintendent February 7, 1936. They showed that on the exterior of the building 19 items remained to be completed, consisting of: repainting portions of the front porch floor; cleaning porches where spotted with cement drippings; cleaning stone work which had been stained

with cement; and other items. In addition, a number of items remained to be completed inside the building, such as installation of door stops; repairing damaged door and woodwork; patching plaster; adjusting and cleaning toilets; adjusting leaky faucets; stopping leaks around vent pipe through the roof, and at a chimney; fitting doors; and general cleaning of building, etc.

36. On February 10, 1936, a conference was held between Lazere, Vice President of the Wilaka Co., Hall who represented plaintiff, and the Quartermaster. This conference took place at the Office of the Quartermaster General, in Washington, and was presided over by the Acting Quartermaster General. The representatives of plaintiff requested that building No. 9 be accepted at that time, and they suggested that if this were done the defendant could withhold final payment until such time as all items remaining to be done had been completed. The Constructing Quartermaster refused to agree to accept the building until it was fully completed. This ruling was sustained by the Quartermaster General. Thereafter, plaintiff proceeded to complete the buildings without written protest, and without taking an appeal to the head of the department except as shown in finding 46.

At the request of plaintiff's superintendent, another inspection of building No. 9 was made March 2, 1936. This inspection, like the one of February 6, disclosed that a number of items were still incomplete. A list setting forth the incomplete items was furnished to plaintiff. Some of the items shown on the list of February 7, hereinbefore referred to, still remained to be done.

During November and December 1935, and January 1936, the work done on building No. 9 consisted, in addition to corrective work, of completing a number of initial items, such as installing millwork, including doors, rails, and shoemold; laying, sanding, and finishing wood floors; placing linoleum floor covering; painting interior and exterior; and installing hardware, pipe covering, electric fixtures, etc.

No written protest was made by plaintiff to defendant as to acceptance of building No. 9, as required by Art. 15 of the contract, except the letter of protest dated March 25, 1936,

as set forth in finding 34, nor was the action of defendant's contracting officer capricious or arbitrary.

37. Building No. 9 was occupied promptly after March 20, 1936, when it was completed and accepted.

38. The Wilaka Company failed to provide adequate and proper planning of the contract work. It also failed to properly coordinate the work so as to insure efficiency and expedition even after the date for completion of the contract work, September 8, 1935. The work was not expedited nor carried forward promptly in a workmanlike manner. All of this caused serious delay and largely prevented completion of the contract work by September 8, 1935, and resulted in serious loss to plaintiff.

39. The office of Quartermaster at Aberdeen Proving Grounds was maintained after September 8, 1935, for the sole purpose of inspecting and accepting the buildings covered by the contract in suit. All costs of maintaining that office after September 8, 1935, applied to the contract in suit except for the period September 8 to 27, 1935, when 10% of the time of the Quartermaster, one inspector, and one clerk was applicable to other contract work. The sum of $7,811.62 deducted from payments made to plaintiff is exclusive of these services, the value of which is $65.72.

The military and civilian personnel retained at the office of the Quartermaster, whose services constitute the charges assessed against plaintiff, were necessary for the supervision and inspection of the work remaining under the contract in suit after the date fixed for its completion. Promptly after the contract in suit was completed the office of the Quartermaster was closed.

Rental Allowances Paid

40. The defendant deducted from the balance of the contract price the sum of $3,624.00 incurred and paid by it to sixteen officers of the U. S. Army, of varying rank, for rental allowances because of failure on the part of plaintiff to complete and deliver possession of the buildings on September 8, 1935, the contract completion date. The officers for whom the new quarters were being constructed and to whom the

rental allowances were paid by defendant and deducted from payments to plaintiff had moved off the post because the old quarters formerly occupied by them had been demolished. The temporary accommodations available within the vicinity of the post were unsatisfactory, and the new buildings were urgently needed. The work of demolishing the old buildings was commenced prior to the time the prime contract was entered into, and it continued after the contractor started work.

Temporary Heat

41. Plaintiff claims that building No. 9 covered by the contract in suit was substantially completed and should have been accepted by December 31, 1935, but temporary heat was required therein until March 20, 1936; that it was the obligation of the defendant under the contract to accept this building by December 31, and thus relieve plaintiff of the cost of furnishing temporary heat during 1936.

The specification provision G–C 15 relating to temporary heat provided that—"The Contractor shall provide and maintain heat in buildings in manner approved by the C. Q. M. during cold or wet weather, while work is progressing and until same is dry."

42. By letters of October 14, and November 14, 1935, the Quartermaster called plaintiff's attention to the above specification, and he requested that temporary heat be provided during cold weather to protect the buildings. Plaintiff's subcontractor, the Wilaka Co., by letter of November 16, 1935, stated in response to these letters that its superintendent in local charge of the project had been instructed to provide temporary heat in the buildings in which work was in progress requiring temperatures higher than outside and stated that, "in accordance with your instructions of November 14th, we will furnish temporary heat in buildings wherein the application of construction materials has been completed by us. This is, of course, being done under protest and in anticipation of reimbursement."

43. Plaintiff furnished temporary heat in the various buildings up to the dates of their acceptance. No appeal

from the order of the Quartermaster to provide heat was taken to the head of the department. Plaintiff was not required to, and did not furnish any heat after the buildings were accepted.

The entire cost to plaintiff of furnishing temporary heat to the buildings was: Labor $1,522.00 and coal $809.32, making a total of $2,331.32. Plaintiff, however, makes claim for reasonable value of labor and materials amounting to $1,523.68 for heat in building No. 9 during January, February, and March, 1936.

The labor used in furnishing the temporary heat was provided under a subcontract between the Wilaka Company and E. A. DeWaters. The evidence does not show that plaintiff's overhead costs were increased because of furnishing temporary heat.

No appeal from the order of the Constructing Quartermaster to provide heat was taken to the head of the department. Plaintiff did include this item in its protest of March 25, 1936 (finding 34.)

The facts relating to the status of completion of the buildings at the time of and prior to their acceptance, and to the dates on which they were accepted, as well as the contract provisions relating to acceptance, are pertinent to plaintiff's claim for refund of excess costs deducted for delay in completion of the contract and are set forth under those claims. (findings 27–36.)

Tax Deduction

44. The sum of $901.18 was deducted by the defendant from the amount otherwise due plaintiff by reason of an unpaid income and profits tax indebtedness due to the United States from the C. & W. Company, the prime contractor, for 1933, in the aggregate amount of $759.60 plus interest to March 18, 1936.

45. The contract by art. 16 provided that partial payments would be made by the defendant to the contractor as the work progressed, at the end of each calendar month, on estimates made and approved by the contracting officer, taking into consideration also the material on the site; that in making such partial payments there would be retained 10% on

the estimated amount until final completion and acceptance of all work covered by the contract.

In accordance with this provision of the contract, the defendant did make payments to the contractor and its successor, the completing surety, at the end of each month, retaining a percentage therefrom until final completion of the original work.

These payments were based on vouchers. Each voucher, throughout the period of performance was signed by plaintiff's representative as being just and correct and the amount unpaid, and was also approved and signed by defendant's Quartermaster as being just and correct.

46. In final settlement in connection with the final voucher defendant paid plaintiff a total of $22,039.42 as the balance due it under the contract for completion of the work, less excess cost to the Government occasioned by plaintiff's delay in completion, and less the deduction of $901.18 for taxes due by the C. & W. Company.

This settlement is shown by a letter of September 13, 1937, from the Comptroller General to plaintiff, in part as follows:

> The settlement voucher administratively prepared March 26, 1936, to which you make reference as constituting the final settlement under the Heard Act (*Globe Indemnity Co.* v. *United States*, 491 U. S. 476) for a net balance of $12,183.60 was the basis of your letter of March 25, 1936, to the contracting officer, submitted as a final release, subject to 14 reservations as to claims for extras in an aggregate amount of $23,195.12, which the contracting officer found and decided were not allowable. Your said final release letter otherwise is as follows: * * *
>
> Upon the basis of the facts now administratively reported and subject to what is said above, the contract account may be stated as follows:

Amount earned by defaulted contractor		$328, 432. 55
Payments to defaulted contractor:		
By disbursing officers	$311, 737. 21	
To settle tax liability reported by the Bu. of Int. Rev., GAO settlement No. 0439072 of March 19, 1937	901. 18	
		312, 638. 39
Unpaid balance earned by defaulted contractor		15, 794. 16

Damages or increased costs to Government reported to have resulted from default	$11,435.62
Net unpaid balance earned by defaulted contractor	4,358.54
Total contract price, including all changes	478,161.10
Less amount earned by defaulted contractor	328,432.55
Amount due for work you caused to be completed	149,728.55
Sum of payments to you as completing surety	132,047.67
Unpaid balance due for work you caused to be completed	17,680.88

47. On April 11, 1938, by Certificate of Settlement issued by the Comptroller, payment of $22,039.42 was made to plaintiff as representing the unpaid balance of retained percentage earned by C. & W. Company of $4,358.54 and the unpaid balance for work performed by plaintiff in completing the contract amounting to $17,680.88.

In accepting the payment in final settlement of the contract, plaintiff reserved its rights to file a claim for items involved in this suit.

The court decided that the plaintiff was entitled to recover for the taxes deducted in final settlement.

LITTLETON, *Judge*, delivered the opinion of the court:

The items making up plaintiff's claim of $15,213.04, which it insists the defendant illegally charged and withheld, are set forth in finding 7.

The C. & W. Construction Company and the defendant entered into a contract March 27, 1934, for the construction by the C. & W. Co., of twenty-three buildings, including certain utilities, for Army Officers' Quarters at Aberdeen, Md., for $476,900. Plaintiff was surety on the contractor's performance bond. The contract period for completion began on March 31, 1934, and ended September 8, 1935. The original contractor abandoned the work and defaulted on the contract February 8, 1935, without fault on the part of the defendant. The plaintiff, as surety, was so notified February 8 and 21, 1935, and it advised defendant that it would take appropriate action upon being advised that the contractor

had been declared in default. It was so advised February 23. Thereupon, plaintiff agreed and undertook through a subcontract with the Wilaka Construction Company to complete the unfinished contract work. It was unable to do so within the remaining contract time, and the various buildings, except building No. 9, were not completed and accepted until the dates stated in finding 28. Building No. 9 was not completed and accepted until March 20, 1936.

The items in issue grow out of the following matters:

The defendant required plaintiff to replace, at its own cost, certain concrete floors constructed by the prime contractor which had been damaged by water freezing under them, which damage defendant held had been due to the fault of the original contractor; defendant also denied plaintiff's claim for compensation for this work and its request for a 30-day extension of time on account thereof; and, also, plaintiff's claim for furnishing temporary heat after December 31, 1935. In addition to this defendant charged against plaintiff and deducted from the amount otherwise due it under the contract certain sums representing (1) rental allowances, in lieu of quarters, paid to certain Army officers because of delayed completion of the buildings intended for their use, (2) certain costs paid out by defendant for its supervisory force of employees at the site after September 8, 1936 (the completion date), and (3) $901.18, income tax due by the prime contractor for 1933.

Plaintiff filed claims with defendant on the grounds on which this suit is based and, in this action, seeks to recover the entire cost of $5,059.61 for replacing the concrete floors; the amount of $1,523.68 for temporary heat after December 31, 1935; all the charges of $3,624 for rental allowances after September 8, 1935; the amount of $1,488.21, civilian salaries and supervisory costs to defendant for thirty days, between September 8 and October 8, 1935; improper charges for civilian salaries and supervisory costs of $2,616.36 for January, February, and to March 20, 1936 (on the ground that building No. 9 should have been accepted December 31, 1935), and the entire tax deduction of $901.18. All of plaintiff's claims, except that relating to the tax deduction of $901.18,

were considered and denied under art. 15 of the contract by the Constructing Quartermaster, the Quartermaster General, and the head of the Department. Plaintiff claims that these findings and decisions were arbitrary and capricious, and in clear violation of the contract.

Item 1, replacing concrete floors

The facts established by the greater weight of evidence concerning the claim for $5,059.61, and thirty days' additional time, are set forth in findings 9 to 25, inclusive. Plaintiff claims that these concrete floors were damaged by water getting under them and freezing, because of the failure of defendant to perform its duty of having a general drainage system installed so that the subsoil drains and down spouts to be installed under the contract in suit could have been connected therewith before the cold weather in January and February 1935. In addition to the fact that there was no express or implied provision in the contract in suit that defendant would have the general drainage system installed at any particular time, the evidence satisfactorily shows and the contracting officer found and decided that the damage to the floors was not caused by lack of a general drainage system, but by the failure of the original contractor, the C. & W. Company, to timely and properly backfill around the buildings. The decisions made under art. 15 of the contract cannot, on the evidence submitted, be upset.

This conclusion also disposes of that portion of plaintiff's claim for return of $1,488.21, deducted as excess costs occasioned by delay in completion, and representing salaries paid to defendant's supervisory staff and the Construction Quartermaster for the period September 8 to October 8, 1935, for which it is claimed an extension should have been granted on account of the extra concrete work. Moreover, the evidence does not satisfactorily show that the work of replacing the damaged floors necessarily operated to delay completion of the other original contract work.

Plaintiff is not entitled to recover on the items mentioned, totaling $6,547.82.

Item 2, deduction of rental allowances paid to Army officers

This item of the claim represents the amount of $3,624 paid by defendant (finding 40) to certain Army officers as rental allowances in lieu of quarters between September 8, 1935, the contract completion date, and the dates on which the several buildings were completed, accepted, and occupied by officers of the Army for whose use they were being constructed. Defendant charged plaintiff with this amount as a part of the "excess cost occasioned to the Government," within the meaning of art. 9 of the contract, by reason of default of the original contractor and failure of plaintiff to complete its work on time (see findings 26 to 39, incl.).

It cannot be denied that this was an excess cost occasioned to the Government by reason of the conditions mentioned, for if the buildings had been completed by September 8 this cost would not have been incurred. Plaintiff argues, however, that rental allowances are special damages not within the contemplation of the contract and that art. 9 of the contract contemplated only general damages, such as any excess construction costs and excess supervisory costs and expenses directly connected with performance of the work. We cannot agree with plaintiff's argument, and this court has held to the contrary in *John M. Whelan & Sons, Inc.* v. *United States*, 98 C. Cls. 601; *LeRoy Collins, Receiver* v. *United States*, 93 C. Cls. 369; *Modern Industrial Bank* v. *United States*, 101 C. Cls. 808, 821, 822. See, also, *American Surety Company* v. *United States*, 136 Fed. (2d) 437, 439, and *United States* v. *American Surety Company*, 322 U. S. 96.

The first part of art. 9 stipulates liquidated damages in lieu of all excess costs or actual damages occasioned to the Government for delay, and the last part of such article stipulates, in effect, that, in the event of the default of the contractor and the completion of the work by the Government by contract or otherwise, the Government shall be entitled to recover all actual damages proximately and directly attributable to such default and delay in completion measured, as the contract says, by "any excess cost occasioned to the Government thereby."

It will be seen that when default and delay occur this provision does not limit the damages recoverable by the Government to excess construction and direct supervisory costs over the contract price, but to any excess cost *occasioned* thereby. This, of necessity, includes any item of cost occasioned to the Government as a result of the default or delay which would not otherwise have been incurred under the particular contract had there been no default or delay.

We think the contract contemplated such costs as are in controversy under this item. These costs were in effect rent. They were paid to these officers in order that they might rent quarters because these buildings were not completed so that they might occupy them, and the contracting officer so held; such costs were, therefore, the natural and proximate consequence of the breach of the contract by the prime contractor and plaintiff.

Plaintiff is not entitled to recover on this item.

Item 3, temporary heat and supervisory salaries and costs between December 31, 1935, and March 20, 1936

This item of the claim amounting to $4,140.04, represents the cost to plaintiff of $1,523.68 for temporary heat in building No. 9 after December 31, 1935 (findings 41 to 43), and $2,616.36 deducted by defendant for salaries and expenses of the Construction Quartermaster and the civilian supervisory staff for January, February, and to March 20, 1936 (findings 35 to 37).

The evidence does not establish that building No. 9 was in such state of completion as to be satisfactory for acceptance on December 31, 1935, for the purposes for which it was intended or at any date thereafter until it was accepted as satisfactorily completed on March 20, 1936. The facts show that the decisions of the Constructing Quartermaster and the Quartermaster General, from which plaintiff took no appeal, were reasonable and were not arbitrary. Cf. *Austin Engineering Co., Inc.* v. *United States*, 97 C. Cls. 68, 72, 79.

Plaintiff is therefore not entitled to recover on this item of its claim.

Item 4, deduction of tax due by original contractor

Upon final settlement with plaintiff the Comptroller General found that the C. & W. Co., the defaulting prime contractor, was indebted to the Government to the extent of $901.18 for income tax and interest for 1933, and he deducted this amount from the balance otherwise due plaintiff under the terms of the original contract (findings 44 to 47). The charging of this tax to plaintiff and the deduction of it from the amount due plaintiff, as surety on the bond for completion of the contract work, were improper. *United States Fidelity and Guaranty Co., a Corporation* v. *United States*, 92 C. Cls. 144, 153. Plaintiff is therefore entitled to recover this amount.

Judgment is entered in favor of plaintiff for nine hundred and one dollars, and eighteen cents ($901.18). It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

ROBERT S. ODELL AND COMPANY v. THE UNITED STATES

[No. 45604. Decided November 5, 1945]

On the Proofs

Stamp taxes; profit on sale of Shanghai coins taxable as sale of silver bullion where purchase and sale were made on account of their silver content and not for foreign exchange purposes.—Under the provisions of the Silver Purchase Act of 1934 (48 Stat. 1178), defining silver bullion as "silver which has been melted, smelted or refined and is in such state or condition that its value depends primarily upon the silver content and not upon its form," where it is shown by the evidence that foreign coin still current in the country which had coined it was worth more for its silver content than it was worth as a coin; and where it is shown that transactions involving the purchase and sale of such coin were made on account of their silver content and not for foreign exchange purposes; it is *held* that profit derived from their sale was not a capital gain but a gain

on the sale of bullion under the statute, taxable at the rate of 50 percent of the gain, and plaintiff is not entitled to recover. See *Wells Fargo Bank and Union Trust Company* v. *Anglim* (1943 C. C. H., par. 9575).

Same; Treasury Regulations which are reasonably adapted to enforce Act of Congress have force of law.—Treasury Regulations relating to the taxation of silver bullion under the Revenue Act of 1926, as amended by the Silver Purchase Act of 1934, promulgated by the agency charged with the enforcement of the Act of Congress, are entitled to great weight and since the regulations are reasonably adapted to the enforcement of the Act; it is *held* that they have the force and effect of law, and under these Regulations the sales involved in the instant suit were properly taxed as sales of silver bullion.

The Reporter's statement of the case:

Mr. Llewellyn A. Luce for the plaintiff. *Messrs. Theo. J. Roche* and *James Farraher* were on the brief.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff, a California corporation, reported on its income tax return for 1934 a capital gain of $10,350 on a sale of 230,000 Shanghai dollars. In its return for 1935 it also reported a capital gain of $81,048.50 on a sale of 800,000 Shanghai dollars. The Commissioner of Internal Revenue assessed the profits derived from these sales under the Revenue Act of 1926, as amended by section 8 of the Silver Purchase Act of 1934 (48 Stat. 1178), which levied a tax of 50 per centum of the profit derived from sales of silver bullion.

2. Plaintiff paid the tax with interest and duly filed a claim for refund, which was rejected on January 2, 1940.

3. In July and August 1934 plaintiff entered into an arrangement with the Wells Fargo Bank for the purchase by it of Shanghai dollars. Pursuant thereto this bank purchased in these months from the P. & O. Banking Corporation in Shanghai, China, 1,310,000 Shanghai dollars. These were transported to San Francisco in due course, and placed in the vaults of the bank in that city.

4. In September 1934, plaintiff purchased from the Wells Fargo Bank of San Francisco 230,000 of Shanghai silver dollars at 36 cents each, and on December 20, 1934, sold them back to the bank at 40.50 cents each, making a profit of $10,350, which it reported on its tax return for the calendar year 1934 as a capital gain. However, on December 20, 1934, the plaintiff also purchased for delivery on May 1, 1935, 230,000 Shanghai silver dollars from the Wells Fargo Bank at 40.70 cents per dollar. The sale by plaintiff and the purchase by plaintiff on December 20, 1934, were contemporaneous transactions, and arrangements for both had been made before either of them was executed.

5. In August and September 1934, plaintiff purchased from the Wells Fargo Bank of San Francisco 410,000 of Shanghai silver dollars at 37.35 cents each and 160,000 at 36.45 cents each. The silver dollars, however, remained in the vaults of the bank, and until August 15, 1935 plaintiff was the owner of 800,000 Shanghai silver dollars in the vaults of the bank, i. e., 410,000 purchased in August 1934 at 37.35 cents each; 160,000 purchased in September 1934 at 36.45 cents each; and 230,000 purchased in December 1934 at 40.70 cents each.

6. On August 15, 1935, plaintiff, through the Wells Fargo Bank as its agent, sold the 800,000 of Shanghai silver dollars to the P. & O. Banking Corporation of London, England; i. e., 400,000 at 48.30 cents each and 400,000 at 48.325 cents each, at a total price of $386,600, making a gross profit of $81,435, $81,048.50 of which it reported as a capital gain on its tax return for the calendar year 1935. The silver dollars, however, remained in the vaults of the bank, and they were neither weighed nor assayed; neither was any warranty given as to their weight or fineness. However, see findings 10 to 14, both inclusive.

7. On August 17, 1935, the P. & O. Banking Corporation of London, England, sold the 800,000 Shanghai silver dollars to the Pacific States Savings & Loan Company, San Francisco, California, for the price of $390,400, but the silver dollars still remained in the vaults of the Wells Fargo Bank at San Francisco. This sale from the P. & O. Bank to the

Pacific States Savings & Loan Company was arranged for by Robert S. Odell, who transacted business for the Pacific States Savings & Loan Company, as well as for the plaintiff, Robert S. Odell and Company, although his exact official status with Pacific States Savings & Loan Company does not appear.

8. In February 1936 the Pacific States Savings & Loan Company, acting through the Wells Fargo Bank, caused the 800,000 silver dollars to be taken to the United States mint at San Francisco where they were melted and reduced to 611,340.60 ounces of silver bars, .999 fine, which were sold to the Wells Fargo Bank, agent, for $273,574.92, thus resulting in a loss of $116,825.08 to the Pacific States Savings & Loan Company. This sale was made on February 18, 1936, and the bars of silver were returned to and remained in the vaults of the Wells Fargo Bank until August 4, 1936, at which time they were sold by the Wells Fargo Bank, agent, to the Bank of America at a loss of $1,042.14.

9. Shanghai silver dollars and Shanghai paper money had no circulation outside China, but were of equal value in China. Because of the silver content in Shanghai silver dollars and inflation in Shanghai currency, Shanghai silver dollars were worth more outside China than their value as coins and more than were dollars of Shanghai paper dollars; it was profitable to purchase Shanghai exchange or credit outside China, convert it into Shanghai silver dollars in Shanghai, transport the silver dollars to the United States and convert them into silver, and then sell the silver. This was what plaintiff had in mind when it entered into the arrangement with the Wells Fargo Bank for the purchase of the 1,310,000 Shanghai silver dollars heretofore referred to.

10. On December 12, 1934, Wells Fargo Bank, as plaintiff's agent, and referring to plaintiff's Shanghai silver dollars stored in the bank's vaults, wrote to P. & O. Banking Corporation, Shanghai, China, in part as follows:

> On account of the present tax regulations it might suit our client to sell these coins as Shanghai Dollars

in London, as are, without reference to the silver contents thereof. Since you can ascertain from your records the comparative fineness of these particular shipments, no doubt an arrangement could be made for an eventual disposal of the Chinese Dollars through your London Office. We would expect to lay the Dollars down F. O. B. refinery in London. The only other factor to be taken into account would be the cost in London of melting the Dollars into bars.

For your information we mention that the shipments made by you in the past have averaged a return in silver of 0.764 troy ounces, 999 fine, per Shanghai Dollar.

11. By letter dated January 8, 1935, P. & O. Banking Corporation of Shanghai advised the Wells Fargo Bank, in response to the bank's letter of December 12, 1934, that:

> We are not aware if it is possible to sell Chinese Silver Dollars in London before they have been refined into bar silver, * * *.
>
> As you are aware the price quoted for Silver in London is pence per standard ounce .925 fine. From experience we find that the average fineness of the old Chinese Provincial dollar, after melting, is about .82619 standard ounces. The refining charges are ½d per gross ounce, the average gross weight being .85965 ounces after allowing 1 per mille for loss in melting. * * *

12. By letter dated February 5, 1935, P. & O. Banking Corporation of London, England, advised plaintiff's agent, the Wells Fargo Bank, in respect of plaintiff's Shanghai silver dollars, that:

> With reference to your letter of the 12th December last to our Shanghai Branch, copy of which has been forwarded to us, you could consign the Chinese dollars to us here, and after they had been refined and the resultant Silver sold, we could account to you for the proceeds on the basis of a price per fine ounce of Silver or a price per Chinese dollar, as your client preferred. We should, therefore, act merely as your Agents in the handling of the consignment, for which we should charge a commission of ⅛%, and this charge and all other charges would be for your account. * * *
>
> * * * * *

> Our experience during the past six months of shipments of old Chinese Dollars to London has on the average shown the following results:
>
> | Gross Weight per Old Chinese Dollar after loss in melting .8595 ounce per $. | Return in Silver per Old Chinese Dollar .76412 ounce fine equivalent to .82608 ounce standard. |
> |---|---|
>
> * * * * *
>
> When you have given the above matter consideration, if you wish us to sell Silver forward for you against the consignment of the Dollars please send us a cable giving us the necessary instructions. We will, on receipt of such cable, simultaneously with selling the Silver book a place for its refining on arrival at one of the London Refineries. * * *

13. On February 19, 1935, plaintiff's agent, Wells Fargo Bank, advised P. & O. Bank in London of the silver tax situation in the United States, and stated further:

> Due to your experience in these shipments, as well as the fact that all of the silver dollars to be sold were picked out and sent by your Shanghai Office, it seemed to us that you would be willing to buy these Shanghai dollars F. O. B. refinery in London. In your price to us there would of course be the expenses mentioned by you as well as a reasonable allowance for variation in the silver contents of the dollars. We on our part would guarantee that the shipments were the same as sent us by your Shanghai Office.

14. On March 6, 1935, P. & O. Bank in London wrote Wells Fargo Bank that:

> We are in receipt of your letter of the 19th ultimo, and quite appreciate the position as regards the tax on silver in the United States. * * *
>
> You will appreciate that with the wide fluctuations in silver which prevail at present, that we can only make a bid at about 12.45 noon London time on any day excepting Saturday, * * *
>
> As the number of dollars which you have for disposal is in excess of the equivalent of one million standard ounces we think that you would do better by asking us for bids of not more than say $400,000 at a time.

15. The silver content of Shanghai silver dollars in 1934 and 1935 was approximately 88%, and when such dollars were melted down to eliminate the alloys, the recoverable out-turn of .999 fine silver was consistently in excess of ¾ of an ounce per Shanghai dollar.

On December 20, 1934, Shanghai silver dollars were quoted in New York and San Francisco for exchange purposes at prices ranging from 34¢ to 34¼¢ each, and the Federal Reserve Bank of New York listed the official price per dollar on that date as 33.875¢.

On December 20, 1934, .999 fine silver was quoted in New York and San Francisco Exchanges at 54¼¢ to 54⅜¢ per ounce. The London quotation on that date, converted to United States money, was 53.77¢ per ounce for .925 fine silver.

On August 15, 1935, Shanghai silver dollars were quoted in New York and San Francisco for exchange purposes at 37$\frac{1}{16}$¢ to 37⅛¢, and the Federal Reserve Bank at New York listed the official price per dollar on that date as 36.8125¢.

On August 15, 1935, .999 fine silver was quoted in New York and San Francisco Exchanges at 65⅝¢ per ounce. The London quotation for .925 fine silver on that date, converted to United States money, was 65.02¢ per ounce.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit to recover taxes assessed and collected on the sale of Shanghai dollars in 1934 and 1935. The tax assessed was that levied on the sale of silver bullion. Plaintiff says that it sold, not bullion, but foreign coinage.

Section 8 of the Silver Purchase Act of 1934, c. 674, 48 Stat. 1178, 1179, 1181, added the following to Schedule A of Title VIII of the Revenue Act of 1926:

> 10. Silver, and so forth, Sales and Transfers.—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof and allowed expenses, 50 per centum of the amount of such excess. * * *
>
> * * * * *

The term "silver bullion" means silver which has been melted, smelted, or refined and is in such state or condition that its value depends primarily upon the silver content and not upon its form.

The question presented is whether or not these Shanghai dollars were "silver bullion" within the meaning of the above-quoted section of the Silver Purchase Act of 1934.

In July and August 1934 the Wells Fargo Bank of San Francisco, California, at plaintiff's instance, purchased from P. & O. Banking Corporation in Shanghai, China, 1,310,000 Shanghai dollars, for immediate delivery. In due course they arrived in San Francisco and were placed in the bank's vaults.

In August and September of 1934 plaintiff purchased from the Wells Fargo Bank 410,000 of these dollars at 37.35 cents each, and 160,000 dollars at 36.45 cents each. In September 1934 plaintiff purchased from the bank an additional amount of 230,000 of these dollars at 36 cents each. On December 20, 1934 it sold these 230,000 dollars back to the bank at 40.5 cents each, realizing a profit of $10,350.00, which it reported on its tax return for 1934 as a capital gain. On the same day it purchased from the bank, for delivery on May 1, 1935, the same amount of Shanghai dollars, that is, 230,000, at 40.7 cents per dollar.

On August 15, 1935, plaintiff sold to the P. & O. Banking Corporation of London, England, all of the 800,000 Shanghai dollars it had purchased from the Wells Fargo Bank. It sold 400,000 of them at 48.3 cents a piece, and 400,000 at 48.325 cents a piece, realizing a gross profit of $81,435.00. It reported $81,048.50 of this amount as a capital gain for the calendar year 1935.

This profit of $81,048.50 and the profit of $10,350 realized on the sale in 1934 were taxed by the Commissioner of Internal Revenue as sales of silver bullion.

Two days later the P. & O. Banking Corporation of London sold these 800,000 Shanghai dollars to the Pacific States Savings & Loan Company, of San Francisco, for $390,400, which was $3,800 more than it had paid for them. This sale was arranged by Robert S. Odell, who represented not only plaintiff, Robert S. Odell Company, but also this Pa-

cific States Savings & Loan Company. The following year. February 1936, the Pacific States Savings & Loan Company, acting through the Wells Fargo Bank, had these 800,000 silver dollars taken to the mint at San Francisco where they were melted into silver bars. These weighed 611,340.60 ounces, .999 fine. These silver bars were sold to the Wells Fargo Bank, agent, for $273,574.92. In the same year the Wells Fargo Bank, agent, sold them to the Bank of America at a loss of $1,042.14.

The purchase and sale of these dollars was made under the following circumstances: The dollars were legal tender in China. They had the same currency value as Shanghai paper dollars. However, as a result of inflation the value of a Chinese dollar in the United States on December 20, 1934, the date of the first sale by plaintiff, had declined to about 34 cents. On this date silver, .999 fine, was quoted on the New York and San Francisco Exchanges at from 54¼ cents to 54⅜ cents per ounce. The silver content of a Shanghai dollar, after the dollars had been melted to eliminate alloys, was consistently in excess of ¾ of an ounce. Consequently, the value of the silver in a Chinese dollar on December 20, 1934, was approximately 40½ cents, or about 6 cents more than it was worth on United States Exchanges as Chinese currency.

Likewise, on August 15, 1935, the date of the second sale, Shanghai dollars were quoted in the United States at about 37 cents. On the same date silver was quoted on the New York and San Francisco Exchanges at 65⅝ cents per ounce. The silver content of a Shanghai dollar, therefore, was worth nearly 49 cents, or about 12 cents more than a Shanghai dollar was worth as currency.

On the date of both sales, therefore, the silver content of a Shanghai dollar was worth considerably more than a Shanghai dollar was worth as Chinese currency. The question, therefore, is whether or not the sale of foreign coinage still current in the country which had coined it, but whose silver content made it worth more for its silver than it was worth as a coin, is to be taxed as a sale of silver bullion, or as a sale of money.

This question finds its answer in the definition of silver bullion as contained in the Silver Purchase Act of 1934. It is defined as "silver which has been melted, smelted, or refined and is in such state or condition that its value depends primarily upon the silver content and not upon its form." These dollars, of course, had been melted, smelted, and refined, and it is unquestionably a fact that their primary value was on account of their silver content, and not on account of the fact that they were coinage guaranteed by the faith and credit of the Government which had issued them. A person having them for sale was able to realize on them an amount substantially in excess of their value as Chinese coins because of the fact that their silver content made them more valuable than they were as coins. This demonstrates, of course, that they were valuable primarily for their silver content, and not by reason of the fact that they had been cast in the form of a Chinese dollar.

When the plaintiff made its sale in 1934 it realized for them 40.5 cents each, whereas at that time they were worth not in excess of 34¼ cents each as Chinese coinage. From the sale in 1935 plaintiff realized 48.3 cents each for 400,000 of these dollars, and 48.325 cents each for another 400,000, whereas on this date the maximum that could have been realized in the United States for them as Chinese coins was not in excess of 37⅛ cents each. The plaintiff was able to realize these prices because of the fact that they were more valuable for their silver content than they were as coins. It seems clear, therefore, that the value of them depended "primarily" on their silver content, and not on the fact that they were in the form of Chinese currency.

It is true that when the sale was made to the P. & O. Banking Corporation of London on August 15, 1935, these coins had not been weighed or assayed for their silver content, nor was any warranty given as to their weight or fineness. However, it is plain that they were purchased for their silver content and not because they were Shanghai currency.

In the first place, this bank paid for them an amount quite **substantially in excess of what they were quoted as Shanghai** coins.

In the second place, the correspondence between the parties clearly shows that they were purchased for their silver content and not because they were Chinese coins. In a letter written the P. & O. Banking Corporation at Shanghai by the Wells Fargo Bank it was stated that its clients might prefer to sell these coins as Shanghai dollars on account of tax regulations, and it was suggested that this company's London office, to whom they expected to sell the dollars, could ascertain from the records of the Shanghai office "the comparative fineness" of the dollars which had been purchased from the Shanghai office. In the past, it was stated, these dollars had produced .764 ounces of silver, and that the only other factor to be taken into account was "the cost in London of melting the dollars into bars."

In reply the Wells Fargo Bank was advised by the Shanghai office that their experience had shown "that the average fineness of the old Chinese Provincial dollar, after melting, is about .82619 standard ounces."

The Shanghai office of the P. & O. Banking Corporation had sent to its London office a copy of the letter of the Wells Fargo Bank to it of December 12, 1934; no doubt it also sent a copy of its letter to the Wells Fargo Bank of January 8, 1935, in which it had said that the average fineness of the old Chinese Provincial dollar was about .82619 standard ounces. At any rate, as a result of the correspondence between the parties, the London office of the P. & O. Banking Corporation purchased from plaintiff the Shanghai dollars at a price considerably in excess of their value as Shanghai coins. It is quite evident, therefore, that they were purchased not for their value as coins, but on account of their silver content.

We think this particular transaction between the parties shows that the primary value of these coins was on account of their silver content and not on account of the fact that they were Shanghai currency.

Under the Regulations of the Treasury Department, which was charged with the duty of administering this Act, these dollars were unquestionably silver bullion. Article 20 (i)

of Treasury Regulations 85, promulgated under the Revenue Act of 1926, which was amended by the Silver Purchase Act of 1934, states that "Scrap silver is silver bullion." Article 20 (k) states: "The term 'scrap silver' includes * * * silver coin which is no longer held for the purpose for which it was processed, manufactured, or coined." It is quite evident that these Shanghai dollars were purchased and held by plaintiff, not because they were Chinese coins, for which purpose they had been originally "processed, manufactured or coined," but on account of their silver content.

These Regulations, promulgated by the agency charged with the enforcement of the Act of Congress, are, of course, under numerous decisions, entitled to great weight, and since we think they are reasonably adapted to the enforcement of the Act, they have the force and effect of law. Under them these sales were properly taxed as sales of silver bullion.

Plaintiff relies on certain articles of the Silver Regulations issued by the Treasury Department on August 17, 1934, pursuant to the powers conferred on the President by the Silver Purchase Act, approved June 19, 1934, 48 Stat. 1178, and the Executive Order of the President issued thereunder, dated August 9, 1934. These regulations do not convince us that we are wrong in interpreting the intention of Congress in the enactment of this Act.

The conclusion at which we have arrived is in accord with that arrived at by the United States District Court for the Northern District of California in the case of *Wells Fargo Bank and Union Trust Company* v. *Anglim*, decided August 2, 1943 (1943 C. C. H. par. 9575).

We are of opinion that the tax was properly assessed and that plaintiff is not entitled to recover. Its petition will be dismissed. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, Chief Justice, concur.

MADDEN, *Judge*, took no part in the decision of this case.

E. J. ALBRECHT COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 45578. Decided November 5, 1945]

On the Proofs

Government contract; defendant's inability to supply sufficient labor from relief rolls not a breach of contract.—Where the plaintiff, contractor on a Government project in 1938, agreed to plan its work so as to use labor to be obtained from the relief rolls in the manner specified in the contract; and where the plaintiff had the right, under the contract, to insist upon that requirement being modified or waived by the defendant if a sufficient amount of such labor could not be obtained by referrals to satisfy the contract requirements as to the use of relief labor; it is *held* that there was no breach of contract merely because the supply of labor available for referral from the relief rolls was not sufficient to meet the needs of the contractor, and plaintiff is not entitled to recover. See *Frazier-Davis Construction Company* v. *United States*, 100 C. Cls. 120; *Young-Fehlhaber Pile Company* v. *United States*, 90 C. Cls. 4; *Leo Sanders* v. *United States*, 104 C. Cls. 1, distinguished.

Same; no warranty by defendant.—The defendant did not warrant that any particular amount of relief labor would be available; did not impliedly promise to do more than it did; and its inability to provide by referrals from the relief rolls a larger number of persons than was available was not a breach of the contract.

Same; modification of contract by contracting officer.—Plaintiff's contract was a work relief contract only to the extent stated in the contract and specifications; and plaintiff as it had a right to do, used both relief and nonrelief labor; and the contracting officer, upon finding that an adequate supply of relief labor was not available to supply plaintiff's needs under its requisitions therefor, modified the provisions as to relief labor, as he had the right to do, and this modification, which remained in effect at all times thereafter, satisfied defendant's obligation with reference to suplying labor from the relief rolls.

Same; defendant not obligated by implication.—Different minimum wage rates for relief and nonrelief labor were specified in the contract and if it had been intended that defendant would be required to pay plaintiff the difference in such rates if there should be a shortage of relief labor, an express provision to that effect would have been inserted in the contract and not left to implication.

The Reporter's statement of the case:

Mr. George R. Shields, for plaintiff.

King & King, and *Mr. Hirsch E. Soble* were on brief.

Mr. Clay R. Apple, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff seeks to recover $5,368.98 as damages for breach of an alleged implied warranty by defendant under a construction contract to furnish 1,250 man-months, or 133,750 man-hours, of common relief labor for use by plaintiff on the project covered by the contract. Plaintiff obtained and used 512 man-months, or 54,785½ man-hours, of common relief labor at the minimum contract wage rate of 45 cents an hour; and, with the approval of the defendant, obtained and used the balance of the common labor necessary on the job from sources other than relief rolls at the minimum contract wage rate of 50 cents an hour. The amount claimed is made up of $3,948.23, representing this difference in wage rate of 5 cents an hour on 78,964½ man-hours of common relief labor alleged to have been lost, plus $157.93 Social Security taxes, $493.53 insurance, $689.95 overhead and profit of 15 percent, and $79.34 bond premium of 1½ percent.

Defendant denies that it obligated itself to supply plaintiff with any particular amount of common relief labor at 45 cents an hour.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. March 16, 1938, the defendant, through the War Department, issued an invitation for bids for certain construction work involving both skilled and unskilled labor in connection with an earth dam known as Reservoir Project No. 8, located near Arkport, New York.

The invitation for bids included the following provisions:

> 10. *Investigation of Conditions.*—Bidders are expected to visit the locality of the work, and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, availability of labor, uncer-

tainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site. At bidder's request a representative of the Government will point out the site of the proposed operations. Failure to acquaint himself with all available information concerning those conditions will not relieve the successful bidder of assuming all responsibilities for estimating the difficulties and costs of successfully performing the complete work.

15. *Special Emergency Relief Provisions.*—Persons from public relief rolls will be utilized in part as indicated in the specifications. (See Section II, Special Wage and Labor Provisions Pertaining to Persons Employed under the Provisions of the Emergency Relief Appropriation Act of 1937.) Prospective Bidders' attention is invited to the requirement that one man-month of relief labor must be provided for each one hundred dollars ($100.00) of the relief funds available for payment under the proposed contract. (See paragraph 2–01 of the specifications.) Such relief labor must be secured from the United States Employment Service or other designated agencies (paragraph 2–02 of the specifications). This office has been advised by the New York State W. P. A. Administrator that skilled and unskilled relief labor of all crafts are available.

2. April 26, 1938, the contract was entered into between the plaintiff, an Illinois corporation, and the United States, in which plaintiff undertook and agreed for certain prices and within a certain specified time to construct and build an earth embankment dam, including certain concrete construction, spillways, spillway channels, etc., known as the Reservoir Project No. 8, on the Canisteo River, near Arkport, New York.

3. May 12, 1938, the contractor received notice to proceed and began work within ten days thereafter. The work was completed within the period of 550 days allowed by the contract.

4. The rate of wages fixed by the Secretary of Labor as prevailing at the locality of the work is given in a tabulation

under Section 1-31 of the specifications. This tabulation is as follows:

Designation	Steuben County Wage Rate—hourly
Acetylene Cutter and Welder	$1.20
Arc Welder	1.20
Blacksmith	1.00
Carpenter	1.00
Electrician	1.00
Electrician Helper	.60
Finisher Assistant (Rough Concrete)	.65
Finisher Cement (Structures)	1.375
Laborer:	
Common	.50
Concrete Puddler	.60
Mechanic, Heavy Equipment	1.00
Oiler	.75
Operator:	
Air Compressor (Over 160 c. f.)	1.00
Air Compressor (160 c. f. and under)	.75
Batcher Plant	.55
Bulldozer	.65
Clamshell	1.375
Concrete mixer under 14S	1.00
Concrete Mixer 14S and over	1.375
Crane	1.375
Dragline	1.375
Hand Held Rock Drill	.75
Pile Driver	1.375
Pump (Portable)	.75
Shovel	1.375
Tractor	.65
Powderman (Blaster)	.75
Setter, Steel Reinforcing for Concrete	1.35
Truck Driver	.55

5. Section II of the specifications related to special wage and labor provisions pertaining to persons employed under the provisions of the Emergency Relief Appropriation Act of 1937. The pertinent provisions contained in the specifications and relating to the employment of relief labor were as follows:

> 2-01. *Availability of E. R. A. Funds.*—In addition to funds from the regular appropriation acts, funds in the amount of $125,000 are available for payments to the contractor from the Emergency Relief Appropriation Act of 1937, until June 30, 1940. The contractor shall plan his work and the use of machinery and equipment thereon, so as to provide as uniformly throughout the contract period as the status of the work will permit, one man-month of employment in accordance with the following provisions for each $100.00 of the funds available for payment from the Emergency Relief Ap-

propriation Act of 1937. If the contracting officer finds that suitably qualified labor from relief rolls is not available to the extent necessary to provide one man-month of employment for each $100.00 of the funds available for payment from the Emergency Relief Act of 1937, this requirement may be modified by the contracting officer to accord with the available supply of suitably qualified labor on relief rolls. "One man-month of employment" as used in these specifications is defined as employment of one individual for such length of time during one month as will afford that individual the monthly wage of his craft as set forth in paragraph 2-03 (e) of these specifications.

2-02. *Labor Preferences.*—(a) With respect to all such persons employed, they shall be referred for assignment to such work by the United States Employment Service or by such other agency as may be designated by the Federal Administrator of the Works Progress Administration, and preference for employment shall be given to persons certified as in need of relief by the public relief agency approved by the Works Progress Administration and, except with the specific authorization of the Federal Works Progress Administrator or his designated representative, at least 95 percent of the workers paid from Emergency Relief funds shall be such persons.

6. The specifications also contained a tabulation of wage rates applicable to relief work under this contract, which wage rates were in general lower than those fixed by the Secretary of Labor as prevailing wage rates for that locality.

Section 2-03 (e) of the specifications which contained this tabulation was as follows:

(e) The following Schedule of Monthly Earnings in accordance with Executive Order No. 7046, dated May 20, 1935, is applicable to relief work under this contract. The wage rates have been determined by the State Works Progress Administrator for such employees.

Occupational title	Minimum rate per hour	Monthly wage
Acetylene Cutter and Welder	$0.90	$69.30
Arc Welder	.90	69.30
Blacksmith	.80	68.80
Carpenter	1.00	68.00
Electrician	.90	69.30
Finisher, Rough Concrete	.60	57.60

Occupational title	Minimum rate per hour	Monthly wage
Laborer:		
Common	$0.45	$48.15
Concrete Puddler	.55	55.00
Mechanic, Heavy Equipment	.80	68.80
Oiler	.55	55.00
Operator:		
Air Compressor	.75	69.00
Batcher Plant	.55	55.00
Bulldozer	.65	54.60
Clamshell	1.00	69.00
Concrete Mixer less than 1 yd	.65	54.60
Concrete Mixer over 1 yd	1.00	69.00
Crane	1.00	69.00
Dragline	1.00	69.00
Hand Held Rock Drill	.55	55.00
Pile Driver	1.00	69.00
Pump (Portable)	.65	54.60
Shovel	1.00	69.00
Tractor	.65	54.60
Powderman (Blaster)	.75	54.75
Setter, Steel Reinforcing	1.12	68.32
Truck Driver	.55	55.00

7. Plaintiff carried on the work under the contract on an eight-hour six-day week. On a basis of 25 working days per month this resulted in approximately 200 hours a month. Any workman other than relief labor on the job, whether skilled, semiskilled or unskilled, could produce 200 man-hours of labor a month at the prevailing wage rate under the schedule set out in finding 4.

The relief labor wage schedule (see finding 6) not only was in general lower on an hourly basis than the regular wage schedule but also fixed a monthly wage and thus limited the man-hours per month.

The following tabulation is indicative of the comparative monthly wages and man-hours per month for regular labor and relief labor for four occupational groups:

	Regular Labor			Relief Labor		
	Hourly wage	Monthly earning capacity	Man-hours per month	Minimum rate per hour	Monthly wage	Man-hours per month [1]
Acetylene cutter and welder	$1.20	$240.00	200	$0.90	$69.30	77
Carpenter	1.00	200.00	200	1.00	68.00	68
Mechanic, heavy equipment	1.00	200.00	200	.80	68.80	86
Common laborer	.50	100.00	200	.45	48.15	107

[1] The man-hours per month for relief labor are obtained by dividing the monthly wage by the rate per hour.

8. The specifications under article 2–01 provided for an emergency relief fund of $125,000 and that the contractor should use one man-month of relief labor employment for each $100 of the funds available, thus providing for employment of 1,250 man-months of relief labor.

Under this provision the man-hours of relief labor would vary in accordance with the wage rates fixed for relief labor by the specifications.

Referring to the tabulation in the previous finding, if the requirement for 1,250 man-months of relief labor was fulfilled by the employment of carpenters or an equivalent skilled occupational class, this would require 85,000 man-hours (1,250 x 68). If the requirement was fulfilled by the employment of common labor it would require 133,750 man-hours (1,250 x 107).

9. The construction work called for by the contract included a large amount of rolled fill built in 6-inch layers with no stones larger than 6 inches left in the fill. Such a type of construction required a considerable amount of common labor to pick out stones and tamp and sprinkle the fill prior to rolling.

At the conclusion of the work plaintiff's pay rolls indicated the total amount of common labor used to be 339,238 man-hours as against 157,497 man-hours of semiskilled and skilled labor, or, expressed in percentage, approximately 68% of common labor as compared to 32% of semiskilled and skilled labor.

10. Plaintiff limited all its requisitions upon the employment service for relief labor to common labor and did not make any requisitions for furnishing or certifying skilled labor. Plaintiff elected to do this because it obtained all of its skilled labor through the unions and, in the opinion of plaintiff, to have obtained nonunion skilled labor through the relief rolls at a lower wage scale would have resulted in labor difficulties, and also would have placed its machinery in the hands of strangers.

11. Plaintiff made sixty-two requisitions on the New York State Employment Service for common relief labor, the first requisition being dated July 13, 1938, and the last, November 17, 1939. These requisitions called for a total of 566 men; the

first nine specified 55 to 12 men each, the remainder of the requisitions calling for 10 men or less.

Some of the requisitions were not received soon enough so that the men could be notified and sent to the job as requested, and at times, due to fluctuation of a number of common laborers on the relief rolls, men were not available for common relief labor. Relief labor requisitioned and notified to report to the job, in many cases did not go to the job and many that reported did not remain on the job after being employed.

12. During the period in which plaintiff was filing requisitions it notified the New York State Employment Service by forty-seven letters between October 31, 1938, and November 17, 1939, that requisitions had not been filled or had been filled only partially.

13. Paragraph 1–21 of Section I of the specifications provided:

> *Minor Modifications.*—The right is reserved to make such minor changes in the execution of the work to be done under these specifications as, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract, provided that the unit cost to the contractor of doing the work shall not be increased thereby; and no increase in unit price over the contract rate will be paid to the contractor on account of such changes. (See Article 3 of the contract.)

14. Paragraph 2–04 of Section II, relating to relief labor, was as follows:

> *Delays—Damages.*—Any deficiency in the supply of suitably qualified labor to be referred to the work by the United States Employment Service or such other agency as may be designated by the Federal Works Progress Administrator may constitute a basis for demand for the modification of this contract as provided in Article 9 as being an "Act of the Government."

That portion of Article 9 of the contract referred to in the section of the specifications just quoted was as follows:

> * * * *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes

> beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, * * * if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the fact and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

15. August 29, 1938, at which time plaintiff had filed five requisitions for relief labor, plaintiff wrote the New York State Employment Service in regard to the difficulty of obtaining relief labor. Plaintiff, after quoting paragraph 2–01 of the specifications (set forth in finding 5), wrote as follows:

> We have made every effort to comply with the above requirement even to the point of operating the job short handed when men requisitioned from your office failed to report at the time designated.
>
> Our records indicate it is only on very rare occasions that we are supplied with the number of men requisitioned.
>
> We understand that your office is making a determined effort to supply these men but we must point out to you that an orderly prosecution of our work requires that we be able to count on a certain number of men being available for work at all times. In the past we have not been able to count on this because even when the men requisitioned reported for work a large number of them either refused to accept employment after a very short time [*sic*].
>
> We are in full sympathy with the spirit behind this clause of the specifications, that is, the taking of men off relief rolls and putting them to work where they

can support themselves and their dependents. It is our desire as citizens to accomplish this, insofar as possible, without jeopardizing our position under our contract with the Government for the construction of the dam.

If you find that you are unable to furnish the men we need from the relief rolls of your district, we respectfully request that we be released from the requirement for furnishing the 1,250 man-months of labor referred to above.

Our reason for making this request at this time is that the nature of the work being performed this year lends itself to the use of a larger proportion of hand labor and consequent employment of as large number of men than will the work performed during the season of 1939. For this reason it is imperative that we employ at least the minimum number of relief laborers required to keep up our quota.

In consideration of a release from this requirement we would continue to requisition men from your office. These requisitions to be filled by you with competent men from your relief rolls or from lists of unemployed men not on relief but in need of work, it being understood that we would have the right to fill out uncompleted requisitions with men hired from other sources.

In further consideration of this release we would be willing to put such men as are referred for employment by you on our pay rolls at the nonrelief scale of wages and employ them for eight hours per day with the possibility of their working forty-eight hours per week. In this way it would be possible for such men to earn up to twenty-four dollars per week for common labor. This would make these men fully self supporting, take them off the relief rolls, and work to the benefit of the community by creating a group of steady, dependable wage earners able to take care of their responsibilities without help from the community.

Would you be good enough to take this matter into consideration and advise us at the earliest date possible what, if any, action can be taken by your office.

The following reply of September 8 was received in response to this letter:

Considerable difficulty seems to be encountered in filling your requisitions for laborers, certified from relief rolls, whom you must use in accordance with stipulations in your contract with the government. Shortly after my arrival in this office on August 22, I personally

communicated in writing and verbally with the relief offices within the jurisdiction of this office requesting them to submit to me lists setting forth the names and addresses of men certified by them for relief who could be, in their opinion, employed as laborers on this project. From some of the lists received, we find that those persons have already been referred to your project and evidently been severed from same for reasons we do not know. Some of these welfare officers frankly refuse to submit any names, in as much as they state that they are not interested in having any of their charges referred to your project stating as reason: distinct discrimination. What this discrimination consists of, of course, I am unaware of, but in conversation with some of the men, as well as conversation with welfare officers in question they can not see the fairness in having two men, working side by side doing identically the same work, one being paid five cents more per hour and, in addition thereto, entitled to a full weeks earnings of approximately $20.00, while the other unfortunately gets a smaller wage, not only by the hour but also in the number of hours allowed per month. Of course I realize that this condition lies outside the scope of local authorities as it is part of the contract with the government. For this reason I am forced to state that we have been and will be under these conditions, unable to supply you with relief workers from the present rolls but beg to point out that the relief rolls fluctuate and the present number on relief rolls might be increased in the future by persons who would accept employment under the conditions mentioned above.

What I hereafter state is not any opinion of my own or of this office, but is the opinion of the man in the street, citizen of this county, and wage earner or former wage earner in this locality, who must spend his money in the community. According to their information there is not embedded [*sic*] in your contract with the federal government any clause discriminating against nonunion labor or nonunion skilled labor. There seems to exist, however, according to their opinion, what amounts to be practically a closed shop and men have been approached while at work to join various unions in order to remain at work; some might have acceded to such a request. One worker reported that he would join the union providing he was shown what benefits he might derive from so doing but as he could not be reasonably shown any advantage he did not join the union resulting in disintegration from the project.

We have on our rolls men fully qualified in various trades such as, truck drivers, road machinery operators, etc., who find themselves unable to obtain work as they are not union members and do not feel inclined to join the union. They point out that men in their category working on your project are not residents of this community.

While this office emphasizes that it is not interested in any controversy whether or not union or nonunion laborers as a whole should be employed or both, we can but call your attention to the fact that the local residents are fully aware of the contents of the contract in this regard. The writer feels it, as his obligation to the community to refer for placement qualified men of this community to the project, as far as humanly possible, which condition I believe is also embedded [*sic*] as part of your contract.

In accordance with the verbal understanding between the writer and Messrs. Gardner and Frye this office will be pleased to accept your requisitions for any labor, skilled or unskilled, with your requirements stated on the requisition and refer from rolls available in this office.

16. September 2, 1938, plaintiff also wrote the following letter to the District Engineer, who was the contracting officer:

Pursuant to previous conversation and correspondence we beg to advise that the situation with respect to relief labor has not improved and shows no signs of improvement. Despite our very best efforts we are unable to secure relief laborers in sufficient numbers to permit us to satisfy the requirements of paragraph 2–01.

In attempt to secure some help along this line we have written to the New York State Employment Service and are enclosing herewith a copy of our letter.

If the above-mentioned paragraph 2–01 constitutes an obligation, on our part, we feel that since paragraph 2–02 limits the source of such labor to the "United States Employment Service" there is also the obligation upon the part of the United States Employment Service to furnish the labor we require within the specified limits or to release us from the requirement. To date we have been unable either to secure sufficient competent labor or to get a statement that such labor is not available.

We respectfully request that you review the matter and advise us what steps you wish to take to remedy the situation.

17. Plaintiff again wrote a letter to the District Engineer on October 18, 1938, directing attention to the correspondence with the New York State Employment Service, and requesting that a change order be issued. This letter was as follows:

> On August 4, 1938, we advised you of the difficulty being encountered in securing sufficient men from relief rolls to satisfy the stipulations of our contract regarding the employment of relief labor. Throughout the month of August the situation did not improve, and on August 29th we wrote to the New York State Employment Service, a copy of the letter being attached hereto, requesting them either to furnish men as requisitioned, or to take action which would enable us to get a release from the requirements of the contract in this regard. On September 8th we received their reply, a copy of which is enclosed, in which they stated that they were unable to supply men due to various reasons beyond our control. However, we have continued to requisition men from the New York State Employment Service, even though they have been unable to supply the men. In the last few weeks we have asked for over 100 men; only one man has been supplied to us as a result of these requisitions.
>
> We believe the above to be evidence that we have attempted to carry out the terms of our contract relative to the employment of relief labor, but have been unable to do so due to the inability of the government employment agency to fulfill their obligation to furnish us the men. For this reason we respectfully request that a change order be issued relieving us, at least temporarily, of this requirement of Section II of the contract specifications.

In response to this letter the District Engineer on October 24, 1938, wrote plaintiff as follows:

> Reference is made to your letter of October 18, 1938, advising of your efforts to secure relief labor in accordance with Paragraph 2-01 of the specifications for your contract No. W-321-eng-72.
>
> An investigation has been made of the relief labor situation in the vicinity of your job. This investigation shows that to date you have made reasonable effort to comply with the specification provisions with respect to

attempting to secure relief labor from the specified source. The present status of your job in this respect is approved.

As you are aware the relief labor supply fluctuates considerably over any given period. Under these circumstances you cannot be excused from the provisions of the specifications. You will continue to submit labor requisitions to approved sources as provided. Detailed records must be kept of these labor transactions and copies furnished to our local representative. If, at the completion of your contract, records indicate you have complied with the specification provisions, you will not be penalized for failure due to conditions not under your control.

You are cautioned that neither you nor your supervisory employees should take any part in labor controversies that may be construed as discrimination under Paragraph 2–02 of the specifications.

By the second and third paragraphs of this letter, and subsequent letters to the same effect, the contracting officer modified the provisions of the contract as authorized and provided in the specifications, par. 2–01, sec. 11 (finding 5), and par. 2–04, sec. II (finding 14).

18. On December 23, 1938, plaintiff again wrote to the District Engineer as follows:

On October 18, 1938, we last wrote you regarding the failure of the designated employment agency in furnishing us men from relief rolls as we have requisitioned them. Since that time the condition has not changed, with the result that we have not been able to meet the requirements of our contract for the employment of relief labor.

Following is a tabulation of the requisitions we have made to the employment agency from October 25th to December 17th, there being no men reporting for work as a result of these requisitions:

October 25, 1938—10 men * * *.
October 28, 1938—10 men * * *.
October 31, 1938—6 men * * *.
November 9, 1938—4 men * * *.
November 19, 1938—4 men * * *.
November 29, 1938—5 men * * *.
December 3, 1938—5 men * * *.
December 10, 1938—5 men * * *.
December 17, 1938—5 men * * *.

The fact that relief men previously employed are frequently leaving their jobs further aggravates the situation, making for a greater deficiency in the number of man-hours of relief labor available for use here. For your information there is enclosed a tabulation showing the job history of all relief laborers employed on the Arkport Dam prior to December 17th, 1938.

The above matters are brought to your attention so that you will know that we are continuing to endeavor to comply with the contract stipulations regarding the employment of relief labor.

The District Engineer replied to this letter on December 29, 1938, and stated that "The provisions of the District Engineer's letter of October 24, 1938, shall be complied with pending further instruction."

19. Plaintiff's records show that, after the construction work was completed, out of a total of 133,750 man-hours of emergency relief labor at common labor wage rates, plaintiff had been able to secure under the contract by requisition only 54,785½ man-hours.

The common laborers' work under the present contract involved such simple tasks as picking up stones, hand-tamping of fill and sprinkling. These did not require any degree of skill, and there was no material difference in efficiency as between common relief labor and common labor employed from other sources, as applied to this work.

20. On November 27, 1939, plaintiff filed a claim with the District Engineer for increased costs by reason of having to obtain the major portion of the 1,250 man-months of unskilled labor from other than relief rolls.

This claim as presented and as here made was itemized as follows:

Expense incurred due to the fact that our requirements for Emergency Relief Labor were not filled to the extent provided for in Paragraph 2.01 of the contract Specifications.

Total man hours of Emergency Relief Labor for which provision is made in the contract specifications. (Paragraphs 2.01 & 2.03E) 125,000 x 48.15/100 x 0.45________ 133,750

Total man hours of Emergency Relief Labor we were able to secure, by requisition, from the New York State Employment Service:

E. J. Albrecht Company	52,445		
Subcontractors	2,340½		
		54,785½	
Loss in Relief Man Hours		78,964½	
Common Labor-Steuben County Hourly Rate (see Addendum #2—Contract Specifications)		$0.50	
Common Labor-Emergency Relief Rate (see Par. 2.03E—Contract Specifications)		0.45	
Loss per hour		0.05	
78,964½ hours $0.05			$3,948.23
Social Security Taxes 4% of $3,948.23			157.93
			4,106.16
Insurance—12.50% of $3,948.23			493.53
			4,599.69
Overhead & Profit—15% of $4,599.69			689.95
			5,289.64
Bond: 1½% of $5,289.64			79.34
Total			5,368.98

The District Engineer considered the claim and denied it December 18, 1939.

21. The contract contained an article regarding disputes, as follows:

> Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

The specifications, which became a part of the contract, contained the following with respect to protests and appeals:

> 1–25. *Protests and Appeals.*—The Chief of Engineers has been designated by the Secretary of War as his duly

authorized representative to make final decision and to take other action where the terms of the contract require that such decision or action shall be "By the head of the department concerned or his duly authorized representative." If the contractor considers any work required of him to be outside the requirements of the contract, or if he considers unfair any action or ruling of the inspectors or contracting officer, he shall ask for written instrutions or decision from the contracting officer immediately. Any protest based upon such instructions or decision, or claim otherwise arising under the contract, including a request for extension of time under Article 9, shall be submitted to the contracting officer within the period specified in the contract. If the contractor is not satisfied with the ruling of the contracting officer he may, where so provided in the contract, make written appeal to the Chief of Engineers. Such appeals, containing all the facts and circumstances upon which the contractor bases his claim for relief, shall be addressed to the Chief of Engineers, United States Army, and presented to the contracting officer for transmittal within the time provided therefor in the contract.

January 23, 1940, the plaintiff appealed to the Chief of Engineers from the decision of the contracting officer denying plaintiff's claim for increased expenses in the sum of $5,368.98.

April 18, 1940, the Chief of Engineers affirmed the rulings of the District Engineer and denied plaintiff's claim.

Plaintiff's claim, its appeal to the Chief of Engineers, the findings by the contracting officer, and the decisions of such officer and the Chief of Engineers, together with correspondence relating to the claim, are in evidence as exhibit 4.

22. Plaintiff claims the sum of $5,368.98 because of failure of defendant to furnish it with common relief labor to the extent provided for in par. 2–01 of the contract specifications.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff's claim for damages of $5,368.98 is based upon the contention that under the provisions of the contract of

April 26, 1938, relating to relief labor, the defendant impliedly warranted that sufficient qualified relief common labor would be available to provide at least 1,250 man-months, or 133,750 man-hours of relief common labor on the work covered by the contract, and that it would furnish such amount of relief labor to plaintiff for its use on the work at the minimum wage rate of 45 cents an hour and $48.15, or 107 man-hours per month. This contention is based upon par. 15 of the invitation for bids, finding 1 (which did not become a part of the contract), and the specifications, pars. 2–01 and 2–02, finding 5; par. 2–03 (e), finding 6; par. 1–21, finding 13, and par. 2–04, finding 15.

Plaintiff argues that these provisions, particularly par. 2–01, required it to plan its work and the use of its plant so as to provide 1,250 man-months of persons, at least 95 percent of whom were to be obtained from defendant's relief rolls and at least 95 percent of whom were to be paid at the wage rate of 45 cents an hour; that by such provision in par. 2–01, defendant impliedly warranted that an adequate supply of such relief labor would be available for the employment by plaintiff of 1,250 man-months of labor on the job, and impliedly promised that such relief labor in the amount mentioned would be furnished by defendant as thus required; that in submitting its bid and signing the contract plaintiff relied upon such implied warranty and provision, and planned its work accordingly; that defendant breached its contract when it failed to supply and furnish plaintiff a sufficient number of relief common laborers to provide more than 512 man-months of employment, thereby causing a loss to plaintiff of 78,964½ man-hours of relief common labor which it had to make up by employing non-relief labor at 50 cents an hour which resulted in a loss and damage of the 5 cents an hour difference in wage rate amounting to $3,948.23 and other incidental costs and profit of $1,420.75.

We cannot agree with plaintiff that the provisions of the contract contained an implied warranty by defendant that there would be available sufficient relief labor to provide a total of 1,250 man-months, or 133,750 man-hours, of relief

common labor at 45 cents an hour, or impliedly promised that it would furnish plaintiff with that amount of common labor.

The labor provisions above referred to related to skilled, semiskilled, and common labor, but plaintiff elected, as it had a right to do, to obtain all of its skilled and semiskilled labor from the unions and this left the provision of par. 2–01 of the specification, with reference to the use by plaintiff, if possible, of relief labor to the extent of one-man month of employment for each $100 of the amount of $125,000 emergency relief funds included in the total contract price, applicable only to common labor. As matters turned out, the supply of suitably qualified common labor on the relief rolls was not available for referral so as to provide the 1,250 man-months of employment, and many men that were referred did not report, and many that reported and were employed quit work soon afterwards. However defendant did all that it could, and we think all that it promised or was required to do, in referring to plaintiff for employment all the relief laborers that were available for referral. Plaintiff makes no contention that defendant was careless or negligent, or otherwise at fault, in not referring to it such relief labor as was available. The record is explicit in showing that all relief laborers available were referred.

As we interpret the applicable contract provisions, defendant did not warrant that any particular amount of relief labor would be available; did not impliedly promise to do more than it did, and that its inability to provide by referrals more than 512 man-months of employment of persons from relief rolls was not a breach of its contract.

As has been held by this court in cases involving use of relief labor, plaintiff agreed to plan its work so as to use relief labor to be obtained in the manner specified from the relief rolls and it had the right to insist upon that requirement being modified or waived by defendant if a sufficient amount of such labor could not be obtained by referrals to satisfy the contract requirements as to its use, but there is no breach of contract merely because the supply of relief labor available for referral is not sufficient to meet the needs of

the contractor. Par. 2–02 (finding 5) is the standard provision in this regard. See *Frazier-Davis Construction Company* v. *United States*, 100 C. Cls. 120. The inability of defendant to supply relief labor by referrals coupled with an unwarranted refusal to modify or relieve the contractor from the requirement to use relief labor constitutes a breach of contract. *Young-Fehlhaber Pile Company* v. *United States*, 90 C. Cls. 4; *Leo Sanders* v. *United States*, 104 C. Cls. 1.

Plaintiff's contract was a work relief contract only to the extent of $125,000 of the estimated unit price consideration of $1,026,966 thereunder. Therefore, par. 2–01 of the specifications (finding 5) provided that plaintiff should plan his work and use of equipment "so as to provide as uniformly throughout the contract period [550 days] as the status of the work will permit, one man-month of employment in accordance with the following provisions [pars. 2–02, 2–03 (e), and 2–04] for each $100.00 of the [relief] funds available for payment from the Emergency Relief Appropriation Act * * *." We find nothing in this quoted provision sufficient to constitute an implied warranty that an adequate supply of relief common labor would be available to provide 1250 man-months of employment, or to show that defendant impliedly promised to furnish plaintiff with that amount of relief labor. The remaining provision of par. 2–01 and the provisions of par. 2–04 negative, we think, any such warranty or promise. The sentence immediately following the quoted portion of par. 2–01 stated that "If the contracting officer finds that suitably qualified labor from relief rolls is not available to the extent necessary to provide one man-month of employment for each $100.00 of the funds available for payment from the Emergency Relief Act of 1937, this requirement may be modified by the contracting officer to accord with the available supply of suitably qualified labor on relief rolls."

Par. 2–04, *supra*, also provided as follows:

> *Delays—Damages.*—Any deficiency in the supply of suitably qualified labor to be referred to the work by the United States Employment Service or such other

agency as may be designated by the Federal Works Progress Administrator may constitute a basis for demand for the modification of this contract as provided in Article 9 as being an "Act of the Government."

Throughout performance of the contract plaintiff, as it had a right to do since this was not entirely a W. P. A. or work relief contract, used both relief and nonrelief labor, and on October 24, 1938, the contracting officer, upon finding that an adequate supply of relief labor was not available to supply plaintiff's needs under its requisitions therefor, modified the provisions of par. 2–01 and this modification remained in effect at all times thereafter.

Since different minimum wage rates were specified for relief and nonrelief labor, we think, if the contract had intended that defendant would be required to pay plaintiff the 5 cents an hour difference in such rates in the event there should be a shortage of relief labor, an express provision to that effect would have been inserted and not left to implication. The language of the contract as drawn implies very strongly that the defendant would not pay and would not be responsible for such difference in wage rate. Any deficiency in the available supply of relief labor was not to be regarded as a breach of contract by defendant, and any failure of plaintiff, due to that cause, to use a total of 1250 man-months of relief labor on the job, or any delay resulting from such deficiency in relief labor, were not to be regarded as a breach of the contract by plaintiff. The modification of the provision with reference to use by plaintiff of 1250 man-months' employment of relief labor satisfied defendant's obligation with reference thereto.

Plaintiff is not entitled to recover, and the petition is dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

Syllabus

J. H. CRAIN AND R. E. LEE WILSON, JR., TRUSTEES OF LEE WILSON AND COMPANY, A BUSINESS TRUST v. THE UNITED STATES

[No. 45779. Decided November 5, 1945]

On Plaintiff's Demurrer to Defendant's Plea of Set-Off

Agricultural Adjustment Act; payments unlawfully withheld from tenants; fraudulent representations; defendant entitled to off-set.—Where it is shown that plaintiffs wrongfully and in violation of their agreements under the Agricultural Adjustment Act of 1933 and the Agricultural Conservation Program of the Government during the years 1933 through 1936 withheld from their tenants and sharecroppers their proportionate parts of Government payments; and where it is also shown that certain of such payments were made to plaintiffs under mistakes as to the extent of plaintiffs' compliance with these programs, induced in some instances by false representations on the part of plaintiffs; it is *held* that the defendant is entitled to offset a portion of the amounts so paid to plaintiffs against a payment claimed to be due to plaintiffs on account of their compliance, on their lands, with the 1938 Agricultural Conservation Program under the Soil Conservation and Domestic Allotment Act of 1936, and plaintiffs' demurrer is therefore overruled.

Same, determination of fraud by Secretary of Agriculture; sufficient cause of action.—Where the Secretary of Agriculture on April 9, 1941, after an investigation, determined that in connection with certain transactions relating to the contracts and agreements under the Agricultural Adjustment Act of 1933 plaintiffs had wrongfully and unlawfully retained for their own use, in breach of their express promises, large sums due to them for the benefit of others and had made false representations to defendant, upon which defendant had relied; it is *held* that defendant's plea alleges a cause of action for set-off with sufficient definiteness and certainty in that it specifically alleges and sets forth the acts of plaintiffs on which the charges of breach of trust are based, all of which allegations show that the Secretary of Agriculture had authority to make the determination of April 9, 1941.

Same; defendant's plea of offset.—Where plaintiffs contend that defendant cannot recover any portion of the amount paid to them for 1933, 1934 and 1935 because under the decision in *United States* v. *Butler*, 297 U. S. 1, the Agricultural Adjustment Act of May 12, 1933, the regulations and the contracts, of which the Act was a part, are not binding on them; it is *held* that defendant is not seeking to recover by way of offset any amount

to which plaintiffs were lawfully entitled under the 1933 Act, but is only seeking to recover by way of offset those amounts to which plaintiffs were not entitled because of their misappropriation of certain sums which defendant has made good, and the sums which plaintiffs obtained by false and fraudulent representations.

Same; estoppel by reason of acceptance of benefits under 1933 Act.— Where plaintiffs received and accepted certain large sums from the Government under the Agricultural Adjustment Act of 1933, the Department of Agriculture's program and the contracts thereunder; it is *held* the plaintiffs are thereby estopped from asserting the unconstitutionality of the Act and regulations as a defense to their unauthorized and fraudulent actions. They may not retain the payments which they received under the completed contracts and disavow the obligations which they, by their agreements, imposed upon themselves.

Mr. Scott P. Crampton for plaintiffs. *Mr. George E. H. Goodner* was on the brief.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiffs, who are trustees of Lee Wilson and Company, a common law business trust which operates a large cotton plantation in Arkansas, brought this suit to recover $77,613.46 as a payment due the Lee Wilson and Company Trust on accounts of plaintiffs' claimed compliance, on their lands, with the 1938 Agricultural Conservation Program of the Department of Agriculture under the Soil Conservation and Domestic Allotment Act (49 Stat. 1148, Tit. 16, U. S. C., sec. 590g to 590q). No question is now involved as to the merits of plaintiffs' claim. Defendant has filed a plea of set-off in a total amount of $74,435.38, which represents a portion of the amount previously paid by defendant to plaintiffs for alleged compliance with the Agricultural Adjustment and Agricultural Conservation Program of the Government during the years 1933 through 1936. The plea of set-off alleges that plaintiffs wrongfully and in violation of their agreements withheld from their tenants and sharecroppers their proportionate parts of Government payments and also that cer-

tain of such payments were made to plaintiffs under mistakes as to the extent of plaintiffs' compliance with these programs, induced, in some instances, by plaintiffs' false representations.

Defendant's plea of set-off of $74,435.38 against the amount of $77,613.46 sued for by plaintiffs involves seven items as follows:

1933 Cotton adjustment program:	
Improperly withheld from tenants	$23,009.69
1934 Cotton acreage reduction program:	
Overpayments to plaintiffs	11,262.19
Improperly withheld from tenants	542.67
1935 Cotton acreage adjustment plan:	
Overpayments to plaintiffs	12,715.32
Improperly withheld from tenants	5,932.93
1936 Agricultural Conservation Program:	
Overpayments to plaintiffs	19,014.19
Improperly paid plaintiffs instead of their tenants	1,958.39
Total	74,435.38

The facts alleged in the plea of set-off are substantially as follows:

I

1933 COTTON ADJUSTMENT PROGRAM

($23,009.69 improperly withheld from tenants of plaintiffs)

1. Under the Agricultural Adjustment Act, approved May 12, 1933 (48 Stat. 31; Tit. 7, U. S. C., sec. 601, *et seq.*), defendant, acting through the Agricultural Adjustment Administration, promulgated a program for the voluntary reduction of acreage planted to cotton during 1933 for the purpose of reestablishing the purchasing power of farm commodities through adjustment of the supply of cotton to consumptive requirements. Pursuant to this act plaintiffs entered into a contract with the defendant, consisting of an offer by plaintiffs on July 1, 1933, entitled "Offer to Enter into Cotton Option-Benefit or Benefit Contracts," No. 2000, which was accepted by defendant by delivering a written notice of acceptance to plaintiffs. Under the terms of the contract plaintiffs agreed to take out of production 7,000 of the 21,000 acres planted to cotton on their land, in consideration of a cash payment of $84,000 plus an option to

purchase from the Secretary of Agriculture 4,200 bales of cotton at 6 cents per pound, basis middling ⅞ inch staple cotton as quoted on the New York Cotton Exchange. By its terms the contract was subject to such regulations as were then or might be thereafter prescribed or authorized by the Secretary of Agriculture pertaining thereto.

2. The contract was also subject to Cotton Regulations, Series 1, promulgated by the Secretary of Agriculture and approved by the President July 25, 1933, under the provisions of which plaintiffs were obligated to have the contract signed by all persons who had an interest in the cotton crop then being grown on plaintiffs' lands and covered by the contract. Although there was a large number of persons who had an interest in this cotton crop as tenants or sharecroppers of plaintiffs, plaintiffs executed and submitted to defendant the contract without naming therein or obtaining the signature thereon of any of said tenants and sharecroppers.

3. Pursuant to the act of 1933 the following persons, who were share tenants of plaintiffs, entered into contracts with defendant, consisting of several offers by such persons, each entitled "Offer to Enter into Cotton Option-Benefit or Benefit Contracts" bearing the following respective dates and numbers, each of which was accepted by defendant by delivering a written notice of acceptance to the respective offerer:

Tenant	Contract date	Contract No.
Joe Downing	June 29, 1933	1099
Levi Lemons	July 8, 1933	927
Rufus Lemons	July 8, 1933	1082
Willis Morgan	June 30, 1933	931
Albert Mozell	July 8, 1933	1086
John Mullen	June 28, 1933	1083
Eugene Simes	June 28, 1933	917
W. M. Tolar	July 7, 1933	1085
John Robbins	July 7, 1933	1084
Willie W. Williams	June 30, 1933	932
J. B. Brinkley	July 8, 1933	2644
J. D. Jeffries	July 8, 1933	2645

Under the terms of each of these contracts the tenants of plaintiffs executing them agreed to take out of production a stated number of acres planted to cotton on land owned by plaintiffs in consideration of a stated cash payment.

Each contract was, by its terms, subject to such regulations as were then or might be thereafter prescribed or authorized by the Secretary of Agriculture pertaining thereto.

4. Each contract was also subject to the provisions of Cotton Regulations, Series 1, under which the tenants of plaintiffs executing the contracts were obligated to have them signed by all persons who had an interest in the cotton crops then being grown on plaintiffs' lands covered by such contracts. In each contract plaintiffs were designated as having a lien on the cotton crop covered thereby.

5. Under the provisions of the contracts referred to in findings 1 and 3, above, and Cotton Regulations, Series 1, the sums payable by defendant under the contracts were required to be divided by plaintiffs between themselves and their tenants and sharecroppers in the same proportions as the ratios of the interests of plaintiffs and their several tenants and sharecroppers in the respective cotton crops covered by such contracts.

6. Defendant paid to plaintiffs as producers under contract No. 2000, findings 1 and 2, and as lienholders under the contracts referred to in finding 3, in part as cash payments and in part as settlement of plaintiffs' option to purchase cotton under such contract, the following amounts on the following respective dates:

Contract No.	Amount	Date of payment
2000	$84,000.00	9/23/33
	84,000.00	1/—/34
	31,920.00	2/9/35
	4,200.00	11/10/38
1082	160.00	11/9/33
931	160.00	10/21/33
1086	160.00	11/9/33
1083	180.00	11/9/33
917	180.00	11/17/33
1084	100.00	11/9/33
1085	100.00	11/9/33
932	140.00	9/14/33
2644	400.00	9/7/33
2645	400.00	9/23/33
1099	280.00	11/9/33
927	96.00	10/21/33
	96.00	
	36.48	
	4.80	
9003	11,990.16	11/2/35
	11,990.16	3/20/36
	9,785.87	3/23/36
Total	240,379.47	

All these amounts were paid to plaintiffs for their own benefit and account, and for the benefit and account of plaintiff's tenants and sharecroppers in the proportions referred to in finding 5 above, which amounts were in accordance with the express provisions of the contract to be divided by plaintiffs with their sharecroppers and tenants according to their respective interests therein. Plaintiffs failed, however, to divide any of these amounts between themselves and their tenants and sharecroppers in such proportions, and wrongfully and unlawfully retained for their own use and benefit a total amount of $23,009.69 which defendant had paid plaintiffs for the benefit and account of plaintiffs' tenants and sharecroppers.

7. On April 9, 1941, the Acting Secretary of Agriculture, after an investigation of the matter, made a determination pursuant to the provisions of the act of May 12, 1933, and of the act of February 29, 1936 (49 Stat. 1148; Tit. 16 U. S. C., sec. 590n) and the contracts, that the facts with reference to plaintiffs' failure to make payments to their tenants and sharecroppers of the amounts paid by defendant under said contracts, in said proportions, were those set forth in findings 1 through 6, above, and also determined that plaintiffs should be required to refund to defendant the amounts plaintiffs had received and so failed to pay to their tenants and sharecroppers. Subsequently defendant paid to plaintiffs' tenants and sharecroppers the amount of $23,009.69 which plaintiffs had wrongfully and in violation of the agreement with defendant failed to pay to them.

II

1934 COTTON ACREAGE REDUCTION PROGRAM

($11,262.19 overpaid plaintiffs in Victoria and Wilson areas)

8. Under the act of May 12, 1933, defendant, acting through the Agricultural Adjustment Administration, promulgated a program for the voluntary reduction of acreage planted to cotton during 1934 for the purpose of reestablishing the purchasing power of farm commodities through the adjustment of the supply of cotton to con-

sumptive requirements. Pursuant to this act, plaintiffs entered into the following contracts with defendant, entitled "1934 and 1935 Cotton Acreage Reduction Contract", four of which covered certain lands, therein described, owned by plaintiffs and located in what was commonly referred to as the "Victoria area" three of which covered certain lands therein described, owned by plaintiffs, and located in what was commonly referred to as the "Wilson area", all in Mississippi County, Arkansas:

Area	Contract No.	Date
Victoria	71-047-386	January 30, 1934.
Victoria	71-047-402	January 30, 1934.
Victoria	71-047-523	January 24, 1934.
Victoria	71-047-619	January 30, 1934.
Wilson	71-047-415	January 27, 1934.
Wilson	71-047-519	January 30, 1934.
Wilson	71-047-604	January 27, 1934.

Under the terms of each contract, plaintiffs agreed to reduce the acreage to be planted to cotton in 1934 on the land covered by the contract by not less than 35 percent and not more than 45 percent below the "base acreage" established for such land, which was, by the terms of each contract, to be computed by dividing the total number of acres planted to cotton on such land during the years 1928 through 1932, by the number of years in this period in which cotton was planted on such land, and also agreed to rent to the Secretary of Agriculture for 1934 a stated number of acres of cotton land, stated to be equal to 40 percent of the base acreage for the land covered by the contract.

9. Under the terms of each contract defendant agreed to pay plaintiffs rent for each of the acres thereby rented to the Secretary of Agriculture at the rate of 3½ cents per pound on the average yield of lint cotton per acre for the land in the years 1928 through 1932, inclusive, in two equal installments, plus a parity payment of not less than one cent per pound upon the farm allotment, which was to be computed, under the terms of the contract, as an amount equal to 40 percent of the number of pounds obtained by multiplying the annual average number of acres planted in cotton on the land during the years 1928 through 1932, by the average yield in pounds per acre during such years.

10. These contracts were, by their terms, subject to such regulations or administrative rulings as were then or might thereafter be made or prescribed by the Secretary of Agriculture pertaining thereto, and provided that any violation of such terms, regulations, rulings, or any material misstatement therein or in any information furnished by plaintiffs should be grounds for cancellation of the contracts, in which event plaintiffs would repay to defendant any sums theretofore paid to them, and further provided that the determination of the Secretary of Agriculture that any such violation or misstatement had occurred should be final and conclusive.

11. As a basis for determining the number of acres rented to defendant, the farm allotment for the land, and the amount of payments due thereunder, plaintiffs made representations in each contract as to the cotton acreage and production history of the land for each of the years 1928 through 1932, in terms of bales produced, average weight of lint per bale, total lint produced, acreage planted to cotton and yield of lint per acre. In each contract the representations made by plaintiffs were wholly false and were known by plaintiffs to be false when made by them.

12. The County Committee of Mississippi County, Arkansas, in which county all the lands were located, was required to establish a base acreage and farm allotment for the land covered by each contract, pursuant to the provisions of the act of May 12, 1933, of administrative rulings promulgated thereunder on November 29, 1933, by the Agricultural Adjustment Administration with the approval of the Secretary of Agriculture, and of each contract. This county committee was misled by the representations of plaintiffs, and was erroneously and mistakenly assigned a base acreage and farm allotment for the land covered by each contract which was computed from the false representations as to acreage and production made by plaintiffs in each contract and which was not in accordance with the provisions of the act and administrative rulings.

13. On the basis of the base acreage and the farm allotment so erroneously and mistakenly established under each

contract, defendant erroneously and mistakenly paid to plaintiffs the following amounts on the following respective dates:

Contract No.	Date of payment	Amount	Nature
71-047-386	July 28, 1934	$2,474.86	First rental payment.
	January 25, 1935	2,474.86	Secondrentalpayment.
	January 30, 1935	1,413.62	Parity payment.
		6,363.34	
71-047-402	July 28, 1934	3,604.36	First rental payment.
	January 25, 1935	3,604.36	Secondrentalpayment.
	January 30, 1935	2,057.74	Parity payment.
		9,266.46	
71-047-523	July 28, 1934	1,163.75	First rental payment.
	January 25, 1935	1,163.75	Secondrentalpayment.
	January 30, 1935	664.24	Parity payment.
		2,991.74	
71-047-619	July 28, 1934	2,469.84	First rental payment.
	January 25, 1935	2,469.84	Secondrentalpayment.
	January 30, 1935	1,412.54	Parity payment.
		6,352.22	
71-047-415	July 28, 1934	17,122.56	First rental payment.
	January 25, 1935	17,122.56	Secondrentalpayment.
	January 30, 1935	9,774 75	Parity payment.
		44,019.87	
71-047-519	July 28, 1934	479.71	First rental payment.
	January 25, 1935	479.71	Secondrentalpayment.
	January 30, 1935	275.01	Parity payment.
		1,234.43	
71-047-604	July 28, 1934	2,745.74	First rental payment.
	January 25, 1935	2,745.74	Secondrentalpayment.
	January 30, 1935	1,567.26	Parity payment.
		7,058.74	
Total		77,286.80	

14. On April 9, 1941, the Acting Secretary of Agriculture, after an investigation of the matter, made a determination pursuant to the provisions of the act of May 12, 1933 of said contracts, of the act of February 29, 1936 (49 Stat. 1148; Tit. 16 U. S. C., sec. 590n), and of the act of February 11, 1936 (49 Stat. 1116, 1117), as amended by the act of June 25, 1936 (49 Stat. 1925), that the facts with reference to the execution of these contracts and the making therein of the false representations by plaintiffs were those set forth in findings 8 through 13, above, and further determined that rather than canceling the contracts in their entirety and

requiring plaintiffs to repay the total amounts paid thereunder by defendant, the amount of rental and parity payments properly payable by defendant to plaintiffs should be computed on the basis of the aggregate cotton acreage and production figures for (1) all of plaintiffs' land covered by the four contracts in the Victoria area considered as a unit, and (2) all of plaintiffs' land covered by the three contracts in the Wilson Area considered as a unit; that is, that the land in the Victoria area should be treated as if covered by a single "1934 and 1935 Cotton Acreage Reduction Contract" in lieu of said four contracts, and the land in the Wilson area should be treated as if covered by a single such contract in lieu of the three contracts; and that plaintiffs should be required to repay to defendant the difference between the total amount theretofore paid to them under the seven contracts and the amount properly payable to them as so computed upon the true state of facts.

15. The total amount theretofore paid by defendant to plaintiffs under the four contracts covering the Victoria area was $24,973.76, whereas the total amount properly payable under those contracts as so computed was $11,904.88, a difference of $13,068.88.

16. The total amount theretofore paid by defendant to plaintiffs under the three contracts covering the Wilson area was $52,313.04, whereas the total amount properly payable under those contracts as so computed was $54,119.73, a difference of $1,806.69 in plaintiffs' favor. The net amount overpaid by defendant to plaintiffs under all seven contracts as so computed was, therefore, $11,262.19.

III

1934 COTTON ACREAGE REDUCTION PROGRAM

($542.67 improperly withheld from tenants)

17. Pursuant to the act of 1933 and the program referred to in finding 8, above, plaintiffs, in 1934, entered into (in addition to the seven contracts covering the Victoria and Wilson areas referred to in finding 8) two contracts with defendant entitled "1934 and 1935 Cotton Acreage Reduc-

tion Contract," one of which, bearing No. 71-047-1196 and dated January 29, 1934, covered certain land therein described, owned by plaintiffs, and located in what was commonly referred to as the "Armorel area," and the other of which, bearing No. 71-047-916 and undated, covered certain land therein described, owned by plaintiffs, and located in what was commonly referred to as the "Lepanto area," all in Mississippi County, Arkansas. These contracts covering the Armorel and Lepanto areas, respectively, contained the provisions referred to in findings 8 through 10, above.

18. Under the terms of all nine contracts executed by plaintiffs and defendant under the 1934 cotton acreage reduction program, plaintiffs were obligated to pay to each share tenant and sharecropper producing cotton on the land covered by each and all the contracts a share of the parity payment made by defendant proportionate to each share tenant's or sharecropper's interest in the cotton produced in 1934 on the land covered by the applicable contract, and the contracts further provided that in the event plaintiffs should fail or refuse to make such payments to any share tenant or sharecropper, plaintiffs thereby agreed to forfeit and pay to the Secretary of Agriculture twice the amount which plaintiffs should fail to pay.

19. Defendant paid to plaintiffs under the four contracts covering the Victoria area and under the three contracts covering the Wilson area the parity payments set forth in finding 13. Defendant also paid to plaintiffs under the contracts covering the Armorel and Lepanto areas, respectively, parity payments in the following amounts on the following respective dates:

Contract No.	Date of payment	Amount of parity payment
71-047-1196	January 30, 1935	$6,283.00
71-047-916	January 30, 1935	1,009.35

The parity payments under all nine contracts were paid to plaintiffs for their own benefit and account and for the benefit and account of plaintiffs' share tenants and sharecroppers in the same proportions as the ratio of the interests

of plaintiffs and of their several share tenants and sharecroppers in the respective cotton crops covered by the contracts. Plaintiffs failed, however, to divide these amounts between themselves and their share tenants and sharecroppers, as they had expressly agreed to do, in such proportions, and wrongfully, unlawfully, and in violation of their agreements, retained for their own use and benefit a total amount of $542.67 which defendant had paid plaintiffs for the benefit and account of plaintiffs' share tenants and sharecroppers.

20. On April 9, 1941, the Acting Secretary of Agriculture, after an investigation, made a determination pursuant to the provisions of said act of May 12, 1933, and of the contracts, and of the act of February 29, 1936 and of the act of February 11, 1936, as amended by the act of June 25, 1936, that the facts with reference to plaintiffs' failure to make payments to their share tenants and sharecroppers of the amounts paid by defendant under the contracts in the proportions referred to in findings 18 and 19 were those stated in findings 17 through 19, and also determined that, rather than requiring plaintiffs to forfeit twice the amount which they had so failed to pay to their share tenants and sharecroppers, plaintiffs should be required to refund to defendant only the total amount which plaintiffs had failed to pay to their share tenants and sharecroppers. Subsequently defendant paid to plaintiffs' tenants and sharecroppers the amount of $542.67 which plaintiffs had wrongfully, and in violation of their agreements, failed to pay them.

IV

1935 COTTON ACREAGE ADJUSTMENT PLAN

($12,715.32 overpaid plaintiffs in Victoria and Wilson areas)

21. Under the act of May 12, 1933, defendant, acting through the Agricultural Adjustment Administration, promulgated a program for the voluntary adjustment of acreage planted to cotton during 1935 for the purpose of reestablishing the purchasing power of farm commodities through the adjustment of the supply of cotton to consumptive requirements. Pursuant to that act, and proclamation made by the Secretary of Agriculture on November 28, 1934, "Adminis-

trative Rulings Applicable for 1935 to the 1934 and 1935 Cotton Acreage Adjustment Plan," the following contracts entered into between plaintiffs and defendant under the 1934 cotton acreage reduction program (referred to in finding 8,) were, by their terms, and by the administrative rulings, in February 1935, made applicable to the 1935 program:

Area	Contract No.	Date
Victoria	71-047-386	January 30, 1934.
Victoria	71-047-523	January 24, 1934.
Victoria	71-047-619	January 30, 1934.

22. With respect to each of these contracts, plaintiffs and defendant entered into supplementary contracts, each dated March 25, 1935, entitled "1935 Supplementary Document Relating to 1934 and 1935 Cotton Acreage Reduction Contract entered into in 1934," and bearing the same number as the contract which it supplemented. Under the terms of each contract as supplemented plaintiffs agreed to reduce the acreage to be planted to cotton in 1935 on the land covered by the contract by 35 percent of the "base acreage" established for the land under the 1934 program in the manner set forth in finding 8, and also agreed to rent to the Secretary for 1935 a stated number of acres of cotton land, stated to be equal to 35 percent of the base acreage for the land covered by the contract.

23. Under the terms of each contract as supplemented defendant agreed to pay plaintiffs a rental payment on each of the acres thereby rented to the Secretary for 1935 at the rate of 3½ cents per pound on the average yield of lint cotton per acre for the land in such of the years 1928 through 1932, as the lands had been planted to cotton, in two equal installments, plus a parity payment of not less than 1¼ cents per pound on the farm allotment established for the land under the 1934 program in the manner set forth in finding 9.

24. The County Committee of Mississippi County, Arkansas, in which county all the lands were located, erroneously and mistakenly, in reliance upon plaintiffs' representations, assigned the same base acreage and farm allotment for the lands covered by each contract as were assigned to them

under the 1934 program, which base acreages and farm allotments were, as set forth in findings 11 and 12, computed from the false representations made by plaintiffs as to the acreage and production history of the lands, and which were not in accordance with the provisions of said act, administrative rulings, and contracts.

25. On the basis of the base acreage and the farm allotment so erroneously and mistakenly established under each contract, defendant erroneously and mistakenly paid to plaintiffs the following amounts on the following respective dates:

Contract No.	Date of payment	Amount	Nature
71-047-386	June 10, 1935	$2,163.62	First rental payment.
	March 16, 1936	2,163.62	Second rental payment.
	March 9, 1936	1,767.02	Parity payment.
		6,094.26	
71-047-523	June 10, 1935	1,017.45	First rental payment.
	March 16, 1936	1,017.45	Second rental payment.
	March 9, 1936	830.30	Parity payment.
		2,865.20	
71-047-619	June 10, 1935	2,163.62	First rental payment.
	March 16, 1936	2,163.62	Second rental payment.
	March 9, 1936	1,765.67	Parity payment.
		6,092.91	

26. In addition to the three contracts covering lands in the Victoria area under the 1935 program referred to in findings 21 and 22, plaintiffs and defendant also entered into, under the 1935 program, a contract entitled "1934 and 1935 Cotton Acreage Reduction Contract as entered into in 1935," dated June 4, 1935, and bearing No. 71-047-9001, which covered certain land therein described, owned by plaintiffs, and located in the Victoria area, and which constituted part only of plaintiffs' lands covered under the 1934 program by contract No. 71-047-402. In Contract No. 71-047-9001 plaintiffs made representations as to the adjusted average production of lint cotton, adjusted average acreage planted to cotton, and adjusted average yield of lint cotton per acre of the land covered by said contract which were wholly false and which were computed from the false representations

made by plaintiffs in Contract No. 71-047-402 under the 1934 program, as set forth in finding 11.

27. Under the terms of Contract No. 71-047-9001 plaintiffs agreed to reduce the acreage to be planted to cotton in 1935 on the land covered by the contract by 35 percent of the "base acreage" established for said land (which was the adjusted average acreage planted to cotton) and also agreed to rent to the Secretary for 1935 a stated number of acres of cotton land, stated to be equal to 35 percent of the base acreage for the land covered by the contract.

28. Under the terms of Contract No. 71-047-9001 defendant agreed to pay plaintiffs a rental payment on each of the acres thereby rented to the Secretary for 1935 at the rate of 3½ cents per pound on the average yield of lint cotton per acree for the land, in two equal installments, plus a parity payment of not less than 1¼ cents per pound on the farm allotment established for said lands (which was 40 percent of said adjusted average production of lint cotton). By its terms, the contract was subject to and contained the provisions set forth in finding 10.

29. The County Committee of Mississippi County, Arkansas, assigned to the land an erroneous and mistaken base acreage and farm allotment, which base acreage and farm allotment were, as set forth in findings 26 through 28, computed from the false representations made by plaintiffs both in Contract No. 71-047-402 and in Contract No. 71-047-9001 as to the acreage and production history of the land, and which were not in accordance with the provisions of the act of 1933, the administrative rulings and the contract.

30. On the basis of the base acreage and the farm allotment so erroneously and mistakenly established under Contract No. 71-047-9001 defendant erroneously and mistakenly paid to plaintiffs the following amounts on the following respective dates:

Contract No.	Date of payment	Amount	Nature
71-047-9001	May 9, 1936	$3,012.00	First rental payment.
	May 25, 1936	3,012.00	Second rental payment
	May 9, 1936	2,461.02	Parity payment.
		8,485.00	

31. On April 9, 1941, the Acting Secretary of Agriculture, after an investigation, made a determination pursuant to the provisions of the act of May 12, 1933, the provisions of the contracts, the act of February 29, 1936, and of the act of February 11, 1936, as amended by the act of June 25, 1936, that the facts with reference to the execution of the contracts and the making therein of such false representations by plaintiffs were those set forth in findings 21 through 30, and further determined that rather than cancelling Contracts Nos. 71–047–386, 71–047–523, 71–047–619, and 71–047–9001 in their entirety and requiring plaintiffs to repay the total amounts paid thereunder by defendant, the amount of rental and parity payments properly payable by defendant to plaintiffs should be computed on the basis of the aggregate cotton acreage and production figures for all of plaintiffs' land covered by the four contracts in the Victoria area considered as a unit; that is, that the land in the Victoria area should be treated as if covered by a single "1934 and 1935 Cotton Acreage Reduction Contract" in lieu of the four contracts; and that plaintiffs should be required to repay to defendant the difference between the total amount theretofore paid to them under the four contracts and the amount properly payable to them as so computed.

32. The total amount theretofore paid by defendant to plaintiffs under the four contracts covering the Victoria area was $23,537.39, whereas the total amount properly payable under such contracts as so computed was $11,029.22, a difference of $12,508.17.

33. Under the act and administrative rulings referred to in findings 12 and 21, Contract No. 71–047–415 entered into between plaintiffs and defendant under the 1934 cotton acreage reduction program (referred to in finding 8) was by its terms and by the administrative rulings also applicable to the 1935 program. Under the 1935 program plaintiffs and defendant entered into a contract entitled "1934 and 1935 Cotton Acreage Reduction Contract as entered into in 1935," No. 71–047–9003, which covered certain land therein described, owned by plaintiffs, and located in the Wilson area, and which was intended to supersede Contract No. 71–047–415. However, Contract No. 71–047–9003 by mistake

failed to cover by its terms certain of plaintiffs' land in the Wilson area which was covered by Contract No. 71-047-415, and which was not eliminated from the scope of Contract No. 71-047-415 in the manner prescribed by the administrative rulings. This land was operated in 1935 by W. H. Amos and A. J. Young as tenants of plaintiffs, and they produced thereon 66.23 acres of cotton. The base acreage under Contract No. 71-047-9003 was 6,273 acres, of which 35 percent, or 2,195 acres, was stated to be rented to the Secretary of Agriculture. The acreage actually planted to cotton by plaintiffs under the contract was 4,029.74, which acreage, plus the 66.23 acres planted by W. H. Amos and A. J. Young, gave a total planted acreage under the contract of 4,095.97. This exceeded by 18.97 acres the 65 percent of the base acreage which the contract permitted plaintiffs to plant to cotton so that the actual acreage rented to the Secretary of Agriculture was 2,177.03 instead of the stated acreage of 2,195.

34. Contract No. 71-047-9003 contained the provisions set forth in findings 10 and 28. Defendant erroneously and mistakenly paid plaintiffs under this contract a total rental payment of $23,980.32 in two equal installments on September 11, 1935, and March 19, 1936, computed at the contract rate of 3½ cents per pound on the average yield of lint cotton per acre, for each acre stated to be so rented, whereas the correct amount of the rental payment computed at the contract rate on the acreage actually rented was $23,773.17, a difference of $207.15.

35. On April 9, 1941, the Acting Secretary of Agriculture, after an investigation, made a determination pursuant to the provisions of the act of May 12, 1933, of the contract, and of the act of February 29, 1936, and of the act of February 11, 1936, as amended by the act of June 25, 1936, that the facts with reference to defendant's overpayment of rent under the contract were those set forth in findings 33 and 34; and further determined that rather than canceling Contract No. 71-047-9003 in its entirety, as he might have done, and requiring plaintiffs to repay the total amounts paid thereunder by defendant, plaintiffs should be required to repay to defendant only the difference between the rental payment

erroneously made under the contract and the correct amount of rental payment.

V

1935 COTTON ACREAGE ADJUSTMENT PLAN

($5,932.93 improperly withheld from tenants)

36. In addition to Contracts Nos. 71-047-386, 71-047-523, 71-047-619, 71-047-9001 and 71-047-9003 (referred to in findings 21, 26, and 33), under the 1935 program plaintiffs and defendant also executed a contract entitled "1934 and 1935 Cotton Acreage Reduction Contract as entered into in 1935," dated March 15, 1935, No. 71-080-9029, covering certain land therein described, owned by plaintiffs, and located in the Armorel area.

All six of these contracts contained the provisions referred to in findings 10, 18, 22, and 23.

37. Under the terms of all six contracts and under the administrative rulings referred to in findings 12 and 21, plaintiffs were obligated to pay to each cash tenant producing cotton on land rented from plaintiffs and covered by the applicable contract a share of the rental payments made by defendant proportionate to the ratio of the number of acres covered by the contract planted to cotton by plaintiffs to the number of acres planted to cotton by such cash tenant.

38. Defendant paid to plaintiffs under Contracts Nos. 71-047-386, 71-047-523, and 71-047-619 the rental and parity payments set forth in finding 25; under Contract No. 71-047-9001 the rental and parity payments set forth in finding 30; under Contract No. 71-047-9003 the rental payment set forth in finding 34, plus a parity payment of $9,785.84; and under Contract No. 71-080-9029 a rental payment of $17,334.20 in two equal installments on December 9, 1935, and August 5, 1936, plus a parity payment of $7,076.92.

39. All the parity payments were made to plaintiffs for their own benefit and account and for the benefit and account of plaintiffs' tenants and sharecroppers in the same proportions as the ratio of the interests of plaintiffs and

of their several tenants and sharecroppers in the respective cotton crops covered by the contracts. All the rental payments were paid to plaintiffs for their own benefit and account and for the benefit and account of plaintiffs' cash tenants in the same proportions as the ratios of the number of acres covered by the contract planted to cotton by plaintiffs and of the number of acres planted to cotton by plaintiffs' several cash tenants. Plaintiffs failed, however, to divide the parity payments between themselves and their tenants and sharecroppers in the proportions referred to above, and failed to divide the rental payments between themselves and their cash tenants in the proportions referred to above, and wrongfully, unlawfully, and in violation of their agreements, retained for their own use and benefit a total amount of $5,932.93, which defendant had paid plaintiffs for the benefit and account of plaintiffs' tenants and sharecroppers.

40. On April 9, 1941, the Acting Secretary of Agriculture, after an investigation, made a determination pursuant to the provisions of the act of May 12, 1933, of the contracts, and of the act of February 29, 1936, and of the act of February 11, 1936, as amended by the act of June 25, 1936, that the facts with reference to plaintiffs' failure to make payments to their tenants and sharecroppers of the amounts paid by defendant under the contracts in the proportions referred to above, were those set forth in findings 36 through 39, and further determined that rather than cancelling Contracts Nos. 71–047– 386, 71–047–523, 71–047–619, 71–047–9001, 71–047–9003, and 71–080–9029 in their entirety and requiring plaintiffs to repay the total amounts paid thereunder by defendant, and rather than requiring plaintiffs to forfeit twice the amount of parity payments which they had so failed to pay to their tenants and sharecroppers, plaintiffs should be required to refund to defendant only the total amount which plaintiffs had so failed to pay to their tenants and sharecroppers. Subsequently defendant paid to plaintiffs' tenants and sharecroppers the amount due them of $5,932.93 which plaintiffs had wrongfully failed to pay to them.

VI

1936 AGRICULTURAL CONSERVATION PROGRAM

($19,014.19 overpaid plaintiffs in Victoria and Wilson areas)

41. Under the Soil Conservation and Domestic Allotment Act, approved February 29, 1936 (49 Stat. 1148; Tit. 16 U. S. C., secs. 590g to 590q), defendant, acting through the Agricultural Adjustment Administration, promulgated a program for soil restoration, soil conservation, and the prevention of erosion for the purpose of preserving and improving soil fertility, promoting the economic use and conservation of land, diminishing the exploitation and wasteful and unscientific use of national soil resources, and reestablishing the purchasing power of persons on farms through the making of grants to agricultural producers, including tenants and sharecroppers, in connection with the effectuation of such purposes. Pursuant to this act, the Secretary of Agriculture, on April 15, 1936, promulgated administrative regulations entitled "1936 Agricultural Conservation Program—Southern Region—Bulletin No. 1, Revised," and thereafter from time to time promulgated amendments and supplements to the regulations, which, as so amended and supplemented, are codified in "1936 Agricultural Conservation Program—Southern Region—Bulletin No. 1, Revised as of September 1, 1936". These regulations provided that grants would be made in accordance with their provisions and such other provisions as might thereafter be made; that payments would be made for each acre diverted in 1936 from the cotton soil-depleting base and from which in 1936 no soil-depleting crop should be harvested; that the cotton soil-depleting base for a farm should be the acreage of cotton harvested on that farm in 1935, subject to certain adjustments therein stated; that payment would be made at the rate of five cents for each pound of the normal yield per acre of cotton for the farm for each acre so diverted, subject to certain adjustments therein stated; and that all or any part of any payment which otherwise would be made with respect to any farm might be withheld if any prac-

tices should be adopted which the Secretary of Agriculture should determine might tend to defeat the purposes of said program.

42. Plaintiffs, in order to defeat the purposes of this program as applied to the lands owned by plaintiffs in the Victoria and Wilson areas and still obtain maximum grants from defendant under this program, leased to tenants under plaintiffs' control and direction, some of whom actually farmed as agents and employees of plaintiffs rather than as *bona fide* tenants, in 1936 the lands ostensibly leased to them, those parts of the lands owned by plaintiffs in the Victoria and Wilson areas which were entitled to receive comparatively small cotton soil-depleting bases, so that such tenants would (and they actually did) plant on the lands leased to them cotton acreages greatly in excess of the cotton soil-depleting bases; whereas on the balance of the lands owned by plaintiffs in the Victoria and Wilson areas, which was entitled to receive comparatively large cotton soil-depleting bases, large acreages would be diverted from the cotton soil-depleting bases.

43. In order to obtain grants under the program, plaintiffs executed and filed with defendant an application for payment (Form SR-9) dated April 10, 1937, No. 71-047-963, covering lands in the Victoria area which they owned and operated, and executed and filed with defendant a similar application for payment dated March 18, 1937, No. 71-047-1053, covering lands in the Wilson area which they owned and operated.

In their applications, plaintiffs failed to list in the blanks provided for such purpose certain other farms which they actually owned and operated in the Victoria and Wilson areas, respectively, and plaintiffs thereby falsely represented in their applications that they listed all other farms located in Mississippi County, Arkansas, in respect to which plaintiffs had an interest as owners in the crops (or the proceeds thereof) produced thereon.

44. July 16, 1937, defendant paid to plaintiffs $13,050.54 as a grant for their participation in the 1936 Agricultural Conservation Program with respect to the lands in the Victoria area, and on August 13, 1937, also paid to plaintiffs $28,479.51 as a grant for their participation in such program

with respect to lands in the Wilson area. These grants were paid by defendant by mistake and without knowledge of the false representations which plaintiffs had made in their applications for payment, and without knowledge of the scheme referred to in finding 42, which plaintiffs had entered into and carried out to defeat the purposes of the program and still obtain maximum grants from defendant thereunder.

45. On April 9, 1941, the Acting Secretary of Agriculture, after an investigation, made a determination pursuant to the provisions of the act of February 29, 1936, that certain of the ostensible cash tenants operating lands of plaintiffs in the Victoria area were not *bona fide* tenants of plaintiffs but were actually employees of plaintiffs operating the lands on plaintiffs' behalf, and further determined that rather than revoking the grants in their entirety and requiring plaintiffs to repay the total amount thereof, the amount of such grants properly payable by defendant to plaintiffs should be computed on the basis of the aggregate cotton acreage diverted in 1936 from cotton soil-depleting bases for (1) all lands in the Victoria area owned, operated, or controlled by plaintiffs, considered as a unit; and (2) all lands in the Wilson area owned, operated, or controlled by plaintiffs, considered as a unit; and that plaintiffs should be required to repay to defendant the difference between the total amount of the grants theretofore paid to them under the 1936 program and the amounts properly payable to them as so computed.

46. The total cotton soil-depleting bases for all lands in the Victoria area owned, operated, or controlled by plaintiffs was 6,124.9 acres. The total area of all such lands planted to cotton in 1936 was 5,906.6 acres. The total number of acres diverted from the cotton base for said lands was 218.3 acres. Defendant had, however, paid to plaintiffs and their actual or ostensible cash tenants grants computed on a total diversion of 991.6 acres, so that the area of such lands for which grants were excessively and improperly paid to plaintiffs amounted to 773.3 acres. The total amount of the grants erroneously and improperly paid to plaintiffs with respect to the lands owned and operated by them in the Victoria area was $10,942.19.

47. The total cotton soil-depleting bases for all lands in the Wilson area owned, operated, or controlled by plaintiffs was 13,838.5 acres. The total area of all such lands planted to cotton in 1936 was 10,732.5 acres. The total number of acres diverted from the cotton base for such lands was 3,106 acres. Defendant had, however, paid to plaintiffs and their actual or ostensible cash tenants grants computed on a total diversion of 3,606.7 acres, so that the area of such lands for which said grants were excessively and improperly paid to plaintiffs amounted to 500.7 acres. The total amount of the grants erroneously and improperly paid to plaintiffs with respect to the lands owned and operated by them in the Wilson area was $8,072. The total amount erroneously and improperly paid by defendant to plaintiffs with respect to both the Victoria and Wilson areas as so computed was, therefore, $19,014.19.

VII

1936 AGRICULTURAL CONSERVATION PROGRAM

($1,958.39 improperly paid plaintiffs instead of their tenants)

48. Under the 1936 program, in the Applications for Payment (referred to in finding 43) which plaintiffs executed and filed with defendant covering lands which they owned and operated in the Victoria and Wilson areas, plaintiffs failed to list in the blanks provided for such purpose the names of certain cash tenants and sharecroppers who produced cotton on the lands covered by such applications; and with respect to certain cash tenants who were listed in such applications, plaintiffs understated the acreages which represented the proportionate share of such cash tenants in the cotton grown on the lands covered by such applications and correspondingly overstated the acreage which represented plaintiffs' proportionate share in such cotton. Plaintiffs thereby falsely represented in these applications that they had listed the names and addresses of all persons who were entitled to share in the cotton produced on the lands and that they had correctly listed the acreages which represented the proportionate shares in the cotton to which such persons were entitled.

49. Under the 1936 Agricultural Conservation Program and the regulations applicable thereto plaintiffs were not entitled to receive any grants with respect to acreages diverted from cotton on lands owned by them but operated by cash tenants.

50. The grants which defendant paid to plaintiffs for their participation in the program with respect to the lands in the Victoria and Wilson areas were paid by defendant under a mistake and without knowledge of the false representations which plaintiffs had made in their applications, and mistakenly included certain amounts which were properly payable to plaintiffs' cash tenants and their sharecroppers rather than to plaintiffs.

51. On April 9, 1941, the Acting Secretary of Agriculture, after an investigation, made a determination pursuant to the provisions of the act of February 29, 1936, that the facts with reference to plaintiffs' false representations in their applications and the mistaken payments by defendant of the grants were those set forth in findings 48 to 50, and further determined that plaintiffs should be required to repay to defendant such parts of such grants as were so mistakenly and improperly paid to them on this account.

52. The total amount of such erroneous and improper grant paid to plaintiffs with respect to the lands owned or operated by them in the Victoria area on this account was $156.51, and the total amount of such erroneous and improper grant paid to plaintiffs with respect to the lands owned or operated by them in the Wilson area on this account was $1,801.88. The total amount erroneously and improperly paid by defendant with respect to both the Victoria and Wilson areas on this account was, therefore, $1,958.39.

53. Plaintiffs have failed and refused to repay to defendant any part of the amounts which they wrongfully received from defendant as set forth above and defendant has set off these amounts against the claim of $77,613.46 set forth in plaintiffs' petition.

[The court decided that defendant's plea of set-off stated a sufficient cause of action and plaintiff's demurrer was overruled.]

Plaintiffs' demurrer to defendant's plea of set-off is based upon the grounds that the plea fails to state a cause of action for set-off as to any one of the seven items; that it fails to show any authority in law for the findings and determinations made by the Secretary of Agriculture on April 9, 1941; that it fails to show that defendant suffered any loss, injury, or damage by reason of the facts alleged; that it fails to allege fraud or misrepresentations with definiteness and certainty, and that it fails to allege any intent on the part of plaintiffs to defraud or injure defendant.

We think that under the facts alleged and hereinbefore set forth the plaintiffs' demurrer is not well taken.

The petition seeks to recover $77,613.46 under plaintiffs' alleged compliance with the soil conservation program for 1938 and regulations made pursuant to the Soil Conservation and Domestic Allotment Act of February 29, 1936. The merits of this claim of plaintiffs are not now in issue. Before any payment in connection with the amount due plaintiffs under the 1938 program, pursuant to the 1936 act, had been made, the defendant, acting through the Secretary of Agriculture, determined, after an investigation, that in connection with certain transactions and agreements with plaintiffs concerning matters similar in character which arose under and grew out of contracts and agreements with plaintiffs under the Agricultural Adjustment Act of May 12, 1933, and subsequent acts, plaintiffs had violated their express agreements with defendant; had wrongfully and unlawfully retained for their own use, in breach of their express promises, large sums of money paid to them by defendant for the use and benefit of others; had made false and fraudulent representations to defendant, upon which it relied, and thereby obtained large sums to which they were not entitled under the agreements. As a result of his findings the Secretary determined that plaintiffs had wrongfully, and through a breach of trust, retained and used certain sums which did not belong to them and which they had expressly agreed to pay and deliver to others as sharecroppers and tenants, and that as a result of plaintiffs' false and fraudulent representations they had been overpaid certain sums, all of which amounted

to $74,435.38. Accordingly this amount (plus another item of $590.64 not now in issue) was offset against the amount of $77,613.46, then determined to be due plaintiffs under the 1938 program pursuant to the Soil Conservation Act of 1936 and the regulations, and a check for the balance of $2,587.44 was issued and mailed to plaintiffs. Plaintiffs refused to accept the check as payment and have not cashed it.

Defendant's plea alleges a cause of action for set-off with sufficient definiteness and certainty in that it specifically alleges and sets forth the acts of plaintiffs on which the charges of breach of trust and of their agreements, are based; it sets forth, as exhibits, the pertinent portions of plaintiffs' express agreements, all of which allegations show that the Secretary of Agriculture had authority to make the determination of April 9, 1941.

The principal contention of plaintiffs is that defendant cannot recover any portion of the amounts paid to them for 1933, 1934, and 1935 because under the decision in *United States* v. *Butler*, 297 U. S. 1, the Agricultural Adjustment Act of May 12, 1933, the regulations, and the contracts, of which this act and regulations were a part, are not binding on them. Defendant is not seeking to recover by way of offset any amount to which plaintiffs were entitled under the arrangements and agreements between them and the Government under the act of May 12, 1933, and the regulations. It is only seeking to recover by way of offset those amounts to which plaintiffs were not entitled because of their misappropriation of certain sums, which defendant has made good, and the sums which plaintiffs obtained because of their false and fraudulent representations. The plea of set-off is based upon acts of plaintiffs which amount to fraud against the Government and their sharecroppers and tenants. In these circumstances we think the defendant may lawfully recover these sums by way of offset notwithstanding the decision in *United States* v. *Butler*, *supra*. Moreover, plaintiffs received and accepted more than $200,000 from the Government under the 1933 act, the program, and the contracts mentioned in the findings, and they are estopped from asserting the unconstitutionality of the act and regulations as a defense to their unauthorized and fraudulent acts. They

may not retain the payments which they received under the completed contracts and disavow the obligations which they, by their agreements, imposed upon themselves. *Booth Fisheries Company et al.* v. *Industrial Commission of Wisconsin, et al.*, 271 U. S. 208; *Wall et al.* v. *Parrot Silver & Copper Company, et al.*, 244 U. S. 407; *Great Falls Manufacturing Co.* v. *The Attorney General*, 124 U. S. 581, 598; *Daniels* v. *Tearney*, 102 U. S. 415; *St. Louis Malleable Casting Company* v. *George C. Prendergast Construction Co.*, 260 U. S. 469; *Pierce Oil Corporation et al.* v. *Phoenix Refining Company*, 259 U. S. 125; *United States* v. *Kapp et al.*, 302 U. S. 214, 217.

Plaintiffs' demurrer to defendant's plea of set-off is therefore overruled. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

THE ARUNDEL CORPORATION v. THE UNITED STATES

[No. 45947. Decided November 5, 1945]

On the Proofs

Income tax; statute of limitations.—Where the Commissioner of Internal Revenue on May 8, 1941, as required by the statute, notified taxpayer that its claim for refund for 1936, as to the amount in suit which was collected by off-set, had been disallowed and rejected; it is *held* that suit instituted by petition filed in the Court of Claims September 3, 1943, was barred by the statute of limitation (47 Stat. 169, 286).

Same; taxpayer on accrual basis; judgment collected in 1936 for work done in prior years includible in 1936 income.—Where taxpayer, whose books were kept on an accrual basis, received and collected in 1936 a judgment in the State courts of New York, for work performed in prior years; the determination of the Commissioner that the amount so received was taxable as income in 1936 was proper.

Same; claim for 1938 dependent on rejection of claim for 1936; undistributed profits tax.—Where plaintiff also filed a claim for refund for the calendar year 1938 on the grounds that its then pending claims for refund for 1936, if allowed, would increase the divi-

dend carry-over of that year, through 1937, into 1938, and reduce the surtax on undistributed profits in 1938; and where it is found that the determination of the Commissioner rejecting the 1936 claim for refund in question was proper; it is *held* that there can be no recovery for 1938.

The Reporter's statement of the case:

Mr. Wm. S. Hammers for plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.

Mr. Robert N. Anderson and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks to recover alleged overpayments of income taxes in the amounts of $1,869.71 for 1936 and of $436.51 for 1938. The amount of the overpayment, if any, for 1938 depends upon decision of the question presented as to whether the amount of net income of $12,649.40 was taxable in 1936, as defendant contends, or in 1935 as plaintiff contends.

The question presented is whether, under the facts, this item of net income was taxable under the accrual method of accounting in 1935 or 1936. It was received in 1936 as a result of a judgment of the trial court rendered in 1935, affirmed October 16, 1936, on appeal, for material furnished and work performed under a contract with the City of New York which was made and completed 1926.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Maryland corporation with principal office and place of business at Baltimore. Its principal business is that of general contractor, including the mining of sand and gravel.

Its books of record, particularly for the calendar year 1926 and since that time, were kept upon the accrual basis. Its income and expenses were accrued therein according to standard accounting practice.

2. On May 14, 1937, plaintiff filed its completed income and excess profits tax return, under an extension theretofore granted, reporting thereon a total normal tax of $32,622.47 which was thereafter timely assessed. In addition to the

payment of $10,000 on a tentative return filed March 15, 1937, plaintiff made further payments during 1937 of $6,311.24, June 15; $8,155.62, September 15; and $8,155.61 December 15; aggregating $32,622.47. This return was prepared upon the accrual basis.

Not included as part of the gross income reported upon this return, but included under a heading "Non-taxable income" in Schedule M thereto attached, was the following item:

(3) Income from contract earned in 1922 and 1923 recorded in 1936, $12,649.40.

3. Following an investigation of plaintiff's return and of its books and records for 1936, a Revenue Agent recommended an additional tax or deficiency of $2,750.10 which was based in part upon an inclusion in plaintiff's gross income of the item of $12,649.40 originally reported as non-taxable income as aforesaid. This item was shown to represent money received in 1936 as the result of a judgment obtained in a suit at law. It was itemized as follows:

Principal of verdict		$11,058.04
Interest from December 30, 1928 to December 31, 1935	$4,644.38	
Interest in 1936	933.46	
		5,577.84
Court costs recovered	$315.87	
Court costs paid out	302.35	
Excess of costs over amount paid out		13.52
Total		16,649.40
Less Lawyer's fees		4,000.00
Amount included in 1936 income		12,649.40

4. January 25, 1940, plaintiff signed and filed a statutory consent in writing or waiver extending the period for assessment of any taxes for 1936, to and including June 30, 1941. This waiver was accepted and signed by the Commissioner January 27, 1940.

April 4, 1939, plaintiff signed and filed on Treasury Department Form 870 a waiver of restrictions on assessment

and collection of deficiency in tax for 1936, showing income tax in the sum of $852.69. Plaintiff endorsed thereon in handwriting the following:

Additional tax per report of agent	$2, 750. 10
Less tax on receipts from suit 15% of $12,649.40	1, 897. 41
Amount agreed to	852. 69

An assessment was made May 5, 1939, of the agreed amount of $852.69, with interest of $105.82, aggregating $958.61 for 1936, which was paid as follows: April 10, 1939, $852.69; May 18, 1939, $105.82.

5. May 23, 1939, plaintiff filed a written protest contending that the amount of $7,058.04 ($11,058.04, the principal amount of the judgment, less lawyer's fees of $4,000) was not income in 1936 but "rather in 1926 when it accrued" and further that the interest item of $5,577.84 was taxable only to the extent that such income applied to 1936.

6. February 16, 1940, plaintiff filed a formal claim for refund of $2,120.58 for 1936 wherein it set forth as grounds and reasons the following:

> Unemployment and gross receipts taxes in amount of $14,137.30 accrued in 1936 were deducted in 1937 and 1938 when paid; revenue agent who examined the returns for 1937 and 1938 disallowed the deduction then taken. The taxpayer now claims them as deduction in 1936.
>
> See also revenue agent's supplementary report dated November 14, 1939. Taxpayer has protested addition of $12,649.40 to taxable income in revenue agent's original report.

7. March 17, 1941, plaintiff executed and filed another formal claim for refund for 1936 in the amount of $498.45, stating as grounds and reasons the following:

Deduction not taken in return, legal fees		$4, 000. 00
Less income not reported:		
Court costs recovered	$13. 52	
Interest received	663. 48	
		677. 00
		$3, 323. 00

The aforesaid amounts pertained to the judgment hereinabove referred to, the net amount of which was reported in the 1936 return as nontaxable income.

But this claim of March 17 had no connection with the question of whether the tax on the net judgment of $12,-649.90 was due for 1935 or 1936. At that time the tax of $1,869.71 on the principal and interest of the judgment had not been determined, assessed, or collected by the Commissioner. Such tax was never assessed and it was collected by the process of an offset, as hereinafter mentioned, against an overpayment found by the Commissioner to be due on account of the deduction of $14,137.30 claimed in the refund claim of February 16, 1940, of which action the Commissioner notified plaintiff on May 8, 1941.

8. March 17, 1941, plaintiff also executed and filed a formal claim for refund of $436.51 for the calendar year 1938, stating as grounds and reasons the following:

> The taxpayer has claims pending before the Treasury Department for a reduction of taxable income for the year 1936 in the amount of $17,460.30. These claims, if allowed, will increase the dividend carry-over of that year, through 1937, into 1938 and reduce the surtax on undistributed profits in the amount of $436.51. (2½%, Sec. 13 (c) (2) (B), 1938 Act.)

Plaintiff's return for 1938 was filed March 15, 1939, and its last payment of tax assessed thereon was made February 14, 1941, in the amount of $28,234.32.

9. The claim for refund for 1936 which plaintiff filed on February 16, 1940, was allowed by the Commissioner of Internal Revenue as to the item of $14,137.30, representing a deduction from gross income for 1936, and was disallowed to the extent of the tax due on the item of income of $12,649.40 mentioned in the claim by referring to the protest to the proposed tax of $1,869.71 on this item. The Commissioner simultaneously with his decision allowing the deduction of $14,137.30 denied plaintiff's protest against the inclusion of the above mentioned item of $12,649.40 in its gross income for 1936. The allowance of the first item and the disallowance of the second item resulted in a determined overassessment of $223.17 in tax and $27.70 in interest for which a cer-

tificate of overassessment was issued. These overassessments were determined to be overpayments and the aggregate sum thereof, $250.87, with accrued statutory interest thereon, $29.34, was paid to the plaintiff by Treasury check during May 1941.

10. Plaintiff's claim for refund filed February 16, 1940, for 1936, was disallowed and rejected as to the balance not covered in this certificate of overassessment and plaintiff was so notified by registered letter dated May 8, 1941, from the Commissioner of Internal Revenue. The petition herein based on this action of the Commissioner on the refund claim of February 16, 1940, was filed September 3, 1943.

11. The two claims for refund which plaintiff filed March 17, 1941, in the amounts of $498.45 for 1936 and $436.51 for 1938, were disallowed and rejected in full and plaintiff was so notified by registered letter dated September 12, 1941, from the Commissioner of Internal Revenue.

12. The controverted item of $12,649.40, hereinbefore mentioned, represents money which plaintiff received in 1936 as the net proceeds of a judgment in a suit that it instituted on or about June 27, 1929, against the City of New York. Plaintiff's claim in that suit arose under a written contract to furnish services and material. Plaintiff's work was completed under that contract in 1926. A decision in plaintiff's favor in the principal sum of $11,058.04, with interest thereon from December 30, 1928, was entered by the trial court September 7, 1935. The defendant below, City of New York, perfected an appeal therefrom on September 20, 1935. The judgment of the lower court was affirmed, without opinion, on October 16, 1936. (248 N. Y. Appellate Division Reports, Supreme Court, 862.) Copies of the court decision and of plaintiff's contract are in evidence as Joint Exhibits A and B, respectively.

The item of $12,649.40 was not accrued upon plaintiff's books in the year 1926 or at any other time until it was paid to the plaintiff in 1936. This item was not included upon plaintiff's federal return of taxable income for the calendar year 1926, or upon its return for any other taxable period, except for 1936, as above indicated. No tax thereon has ever been paid to defendant, except as hereinbefore stated and as

an adjustment in determining plaintiff's correct tax liability for 1936, in connection with the claim for refund of February 16, 1940.

13. The parties agree that the exclusion of the item of $12,649.40 from plaintiff's gross income for 1936 will affect the surtax upon undistributed profits in its income and excess profits tax return for 1938. The amount of that claimed reduction, if any, cannot be determined until it be established whether the item of $12,649.40, or any part thereof, has been correctly included in plaintiff's taxable income for 1936.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Although we are of opinion on the facts and under the decided cases that the controverted item in the net amount of $12,649.40 was taxable income for 1936 under the accrual method of accounting, it is not necessary to discuss in this connection the facts and the decided cases for the reason that the facts show the suit was barred by the statute of limitation of two years at the time the petition was filed.

During 1926 plaintiff made and performed a contract with the City of New York. Upon completion, a controversy arose between the parties as to the number of cubic yards of sand for which plaintiff should be paid under the contract at the agreed rate of fifty-eight and four-tenths cents a cubic yard. It was admitted that plaintiff had furnished 118,935 cubic yards but the city contended and the engineer who was given authority to decide held that 94,500 cubic yards, or 5 percent more than the contract estimated quantity, was all that was required and permitted by the contract to be paid. The controversy continued and plaintiff brought suit in June 1929. The trial court rendered a decision on September 7, 1935, in plaintiff's favor for the principal sum of $11,058.04, with interest from December 30, 1928, the opinion concluding with the following provision: "Thirty days' stay and sixty days to make a case." The City appealed and the decision of the trial court was affirmed October 16, 1936, and the judgment and interest was

thereafter paid during that year. No portion of the total amount received was ever reported by plaintiff for income tax purposes and no tax was ever paid on the net amount of $12,649.40 thereof until the decision of the Commissioner in May 1941 holding that it was taxable income for 1936 and that a tax of $1,869.71 was due thereon for that year. Plaintiff did, however, disclose in its 1936 return the receipt of the net amount of $12,649.40 and claimed that it was taxable in prior years.

In a claim for refund filed February 16, 1940, plaintiff claimed an overpayment and refund for 1936 based on an additional deduction in that year of $14,137.30 which had erroneously been taken in 1937 and 1938, and in this claim called specific attention to its written protest against the proposed assessment of an aditional tax for 1936 on the net judgment item of $12,649.40. In May 1941 the Commissioner of Internal Revenue allowed the deduction of $14,-137.30 for 1936, and the overpayment resulting therefrom, but reduced the amount refundable by offsetting against it the tax of $1,869.71 determined by him at that time to be due for 1936 on the judgment item mentioned. He, therefore, by the offset, collected the tax in question at that time and so advised plaintiff, and he also notified it on May 8, 1941, as required by the statute, that this claim for refund, except as to the amount of $250.87 ($223.17 tax and $27.70 interest collected), was disallowed and rejected. As a result of that action and that notice, and the rejection of the claim for refund of March 17, 1941, for 1937 and 1938, this suit was instituted on September 3, 1943, more than two years after notice of May 8, 1941 as to the year 1936 (see sec. 1103, Revenue Act of 1932). The suit as to the year 1936 was therefore barred when the petition was filed.

In these circumstances we need not discuss the question whether, under the statute, plaintiff was required as a condition to bring suit to file a claim for refund of the additional tax of $1,869.71 after it was collected for 1936 by the offset made in May 1941.

The claim for refund of $498.45 for 1936 filed by plaintiff on March 17, 1941, and rejected September 12, 1941, does not

help plaintiff on the jurisdictional question. That claim related only to a net deduction of $3,323 for 1936 for attorneys fees paid in that year in connection with the net judgment of $12,649.40, mentioned in the claim of February 16, 1940. The Commissioner allowed that deduction in determining and collecting by offset the additional tax of $1,869.71 in May 1941. The item covered by the refund claim for 1936 of March 17, 1941, is therefore not in question in this suit. Since plaintiff is not entitled to recover for 1936, no overpayment results for 1938. See finding 13.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

JAMES C. WHITE v. THE UNITED STATES

[No. 45955. Decided November 5, 1945]

On the Proofs

Pay and allowances; Army officer retired under section 2 of the Joint Resolution of July 29, 1941.—Where, in accordance with proper orders, plaintiff an officer in the United States Army, was placed on the retired list effective November 30, 1941, in the grade of lieutenant colonel with the retired pay of a major credited with more than 21 years of service; it is *held* that plaintiff is not entitled to recover the difference in the retired pay from December 1, 1941, of a lieutenant colonel with a credit of 23 years of service and the retired pay, which he has been and is being paid, of a major credited with 21 years of service.

Same; retired rank not controlling in the circumstances.—The fact that plaintiff, upon being removed and retired, was given the retired rank of lieutenant colonel under section 3 of the Act of June 13, 1940, is not, in the circumstances, controlling as to the retired pay to which he was and is entitled.

Same; section 24b of 1920 Act suspended.—Section 3 of the Act of June 13, 1940, specifically excluded from its provisions officers removed and retired under section 24b of the National Defense Act of 1920, and the Joint Resolution of July 29, 1941, which suspended section 24b during the National Emergency, was a

substitute for section 24b which was in effect when the Act of June 13, 1940, was enacted.

Same; retirement under 1941 Act; provisions of 1940 Act not applicable.—Since plaintiff was removed and retired under the provisions of the Joint Resolution of July 29, 1941, and in accordance with the recommendations of a board provided for in the Joint Resolution; it is *held* that the provisions of the Act of June 13, 1940, are not applicable and he is entitled only to the retired pay of a major and not that of a lieutenant colonel.

The Reporter's statement of the case:

Mr. Fred W. Shields for plaintiff.
King & King were on the brief.

Mr. Clay R. Apple, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff claims and seeks to recover the difference in retired pay from December 1, 1941, of a major in the Regular Army credited with twenty-one years' service and such pay of a lieutenant colonel credited with more than twenty-three years' service.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff had enlisted service from May 15, 1918, to August 25, 1918. He was a commissioned officer in the Army from August 26, 1918, to October 30, 1919. On July 1, 1920, plaintiff was appointed a second lieutenant, Infantry, Regular Army, and he accepted the commission October 5, 1920. He was promoted to a first lieutenant, dating from July 1, 1920. He was promoted to captain October 1, 1934, and to major July 1, 1940. Plaintiff had continuous active commissioned service from August 26, 1918, to October 30, 1919, and from October 5, 1920, to November 30, 1941.

2. Plaintiff received the following letter of October 2, 1941, from The Adjutant General:

> The Secretary of War directs that Major James C. White, Infantry, now on leave of absence in Washington, D. C., report to The Adjutant General, Room 1522, Munitions Building, at 9:00 A. M., October 9, 1941 on temporary duty for the purpose of appearing before a board of general officers convened under the provisions

of Public Law 190, 77th Congress, and upon completion of this temporary duty he will revert to a leave status.

3. October 9, 1941, plaintiff appeared before the Board of General Officers appointed under authority of Joint Resolution of July 29, 1941 (55 Stat. 606), and the board at that time conducted a hearing pursuant to the provisions of this statute. At the hearing plaintiff resisted retirement.

The Adjutant General sent plaintiff the following communication on November 12, 1941:

> 1. The Board of General Officers appointed under authority of Public Law No. 190, 77th Congress, has recommended your removal from the active list of the Regular Army.
>
> 2. By par. 1, S. O. 262, W. D. 1941, you were granted leave of absence for 23 days effective on or about November 10, 1941, and it is contemplated issuing your retirement order this month effective November 30, 1941.
>
> 3. It is desired that this letter be acknowledged giving address to which you desire your retirement order to be sent when issued. In this connection attention is invited to the fact that a retirement order received while on leave of absence at a place other than the last station allows mileage from the place of receipt of the order by the officer to the designated home only and never for a distance greater than from the last station to home selected. (Par. 1, AR 35-4840, W. D., December 15, 1924).
>
> By order of the Secretary of War.

The Secretary of War issued the following order November 27, 1941.

> The action of the Board of General Officers convened under the provisions of Section 2 of the Act of Congress approved July 29, 1941, recommending that Major James C. White, Infantry, be removed from the active list of the Regular Army, is approved and he will be retired from active service on November 30, 1941, under the provisions of the above mentioned act.

4. The Adjutant General addressed the following communication to plaintiff on November 27, 1941:

> Major James C. White (O-1166) Infantry, is retired from active service, to take effect November 30, 1941,

after more than twenty-two years' service, under the provisions of Section 2 of the Act of Congress approved July 29, 1941 (Public Law 190, 77th Congress), in the grade of lieutenant colonel under the provisions of Section 3 of the Act of Congress approved June 13, 1940. He is relieved from his present assignment and duty at Fort Leonard Wood, Missouri, on November 30, 1941, and at the proper time will proceed to his home. The travel directed is necessary in the Military service.

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By order of the Secretary of War.

5. In accordance with the above-mentioned orders plaintiff was placed on the retired list effective from November 30, 1941, in the grade of lieutenant colonel with the retired pay of a major credited with more than 21 years of service.

6. Plaintiff was removed and retired under the provisions of Joint Resolution of July 29, 1941 (55 Stat. 606), referred to in the retirement order quoted in finding 4 as "the Act of Congress," which provides as follows:

> That during the national emergency announced by the President on May 27, 1941, section 24b of the National Defense Act, as amended, [June 4, 1920] is hereby suspended.
>
> SEC. 2. That during the time of the national emergency announced by the President on May 27, 1941, the Secretary of War, for such causes and under such regulations as he may prescribe, may remove any officer from the active list of the Regular Army: *Provided*, That such removal be made from among officers whose performance of duty, or general efficiency, compared with other officers of the same grade and length of service, is such as to warrant such action, or whose retention on the active list is not justified for other good and sufficient reasons appearing to the satisfaction of the Secretary of War: *Provided further*, That each officer so removed from the active list shall have been recommended for removal by a board of not less than five general officers convened for this purpose by the Secretary of War: *Provided further*, That such officer is allowed a hearing before said board. The action of the Secretary of War in removing an officer from the active list shall be final and conclusive. Officers removed from the active list who have less than seven completed years of commissioned service at the time of removal shall be honorably discharged. Officers removed from the active list who have seven or more

completed years of commissioned service at the time of removal shall be retired with retirement pay computed as follows: Any officer so retired who has over thirty years' service or any officer so retired who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, shall be retired with annual pay equal to 75 per centum of his active duty annual pay at the time of his retirement; any other officer so retired shall be retired with annual pay equal to 2½ per centum of his active duty annual pay at the time of his retirement, multiplied by a number equal to the number of complete years of his service counted for pay purposes under existing laws not in excess of thirty years. All officers retired under the provisions of this section shall be placed on the unlimited retired list.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff brought this suit to recover the difference in the retired pay from December 1, 1941, of a lieutenant colonel entitled to a credit of 23 years of service in the Regular Army and the retired pay, which he has been and is being paid, of a major credited with 21 years of service.

As shown by the findings plaintiff was removed, after a hearing, from the active list of officers of the Regular Army on November 30, 1941, and was retired from active service by the Secretary of War under and pursuant to the Joint Resolution of Congress, approved July 29, 1941 (55 Stat. 606), which made the action of the Secretary final and conclusive. At that time and since July 1, 1940, plaintiff held the rank of major in the Regular Army and was receiving the active-duty pay of the fourth-pay period provided by law for an officer with more than 14 years' service and less than 23 years' service. When plaintiff was removed from the active list he had less than 23 years of continuous service as a commissioned officer.

Plaintiff relies upon the provisions of section 2 of the act of June 13, 1940 (54 Stat. 379, 380) amending Sec. 3, act of July 31, 1935, and contends that under those provisions, which he insists were applicable even though he was removed

under the act of July 29, 1941, he was and is entitled to receive as retired pay three-fourths of the active duty pay of a lieutenant colonel. This act of 1940 repealed section 2 of the act of July 31, 1935, entitled "An Act To promote the efficiency of the national defense," and amended sections 3 and 5 of such act which provided for a promotion list of commissioned officers and made provisions for their promotion and also for their retirement on their own application after a certain specified number of years of service. Section 24b, hereinafter referred to, as amended by the National Defense Act of June 4, 1920 (41 Stat. 773), was in effect in 1935 and provided for removal from the active list and involuntary retirement of commissioned officers placed in Class B by a Board established by the President. Sections 3 and 5 of the act of July 31, 1935, *supra*, as amended by sections 2 and 3 of the act of June 13, 1940, *supra*, relied upon by plaintiff, provided, so far as material, as follows:

> SEC. 2. * * *.
>
> The number of promotion-list officers that shall be in the respective grades at any time after the effective date of this Act shall be such as results from the operation of the promotion system hereinafter in this section prescribed. Promotion-list second lieutenants and first lieutenants shall be promoted to the respective grades of first lieutenant and captain immediately upon completing respectively three years' and ten years' continuous commissioned service in the Regular Army, but not otherwise. Except as hereinafter provided promotion-list captains, majors, and lieutenant colonels shall be promoted to the respective grades of major, lieutenant colonel, and colonel immediately upon completing respectively seventeen years', twenty-three years', and twenty-eight years' continuous commissioned service in the Regular Army: *Provided*, That at no time shall the number of promotion-list colonels exceed seven hundred and five: *Provided further*, That promotion-list majors and lieutenant colonels shall not be promoted to the respective grades of lieutenant colonel and colonel until they shall have completed respectively six years' and five years' continuous commissioned service under permanent appointments in the grades of major and lieutenant colonel, except that for the purpose of determining years of such service in grade officers promoted to or serving in the respective grades of major and lieutenant colonel

shall, in addition to receiving credit for all actual continuous commissioned service in the Regular Army in those grades, receive constructive credit of one-half the amount of their continuous commissioned service in the Regular Army in excess of seventeen and twenty-three years, respectively: *Provided further*, That each promotion-list officer shall be assumed to have, for promotion purposes, at least the same length of continuous commissioned service in the Regular Army and service in grade as any officer junior to him, in his grade, on the promotion list, * * *; *Provided further*, That no officer shall be promoted, under the provisions of this section, in advance of any officer in the same grade whose name appears above his on the promotion list, except that the promotion of an officer shall not be withheld by reason of the fact that an officer senior to him on the promotion list is for any reason not eligible for promotion: *And provided further*, That hereafter all promotion-list officers in any grade shall take rank among themselves according to their standing on the promotion list.

"Sec. 3. That whenever any officer on the active list of the Regular Army or Philippine Scouts shall have completed not less than fifteen nor more than twenty-nine years' service, he may upon his own application be retired, in the discretion of the Secretary of War with annual pay equal to 2½ per centum of his active-duty annual pay at the time of his retirement, multiplied by a number equal to the years of his active service not in excess of twenty-nine years: *Provided*, That the numbers of years of service to be credited in computing the right to retirement and retirement pay hereinbefore provided in this section shall include all service now or hereafter credited for active-duty pay purposes, any fractional part of a year amounting to six months or more to be counted as a complete year: *Provided further*, That any officer on the active list of the Regular Army or Philippine Scouts who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, shall upon his own application be retired with annual pay equal to 75 per centum of his active-duty annual pay at the time of his retirement unless entitled to retired pay of a higher grade as hereinafter provided, * * *

"* * * *Provided further*, That any promotion-list officer retired for any reason except by operation of section 24b, National Defense Act, or wholly retired, who has completed twenty-eight or more years of continuous

> commissioned service in the Regular Army and who has failed to reach the grade of colonel by reason of the limitation on the number of promotion-list officers in the grade of colonel or by reason of the restriction of years of service in grade of major or lieutenant colonel shall be retired in the grade of colonel with retired pay computed as otherwise provided by law for a colonel with the same length of service including all service now or hereafter credited for active-duty pay purposes, and any such officer who has completed more than twenty-three but less than twenty-eight years of continuous commissioned service in the Regular Army and who has failed to reach the grade of lieutenant colonel by reason of the restriction of years of service in grade of major shall be retired in the grade of lieutenant colonel with retired pay computed as otherwise provided by law for a lieutenant colonel with the same length of service including all service now or hereafter credited for active-duty pay purposes: * * * *Provided further*, That each promotion-list officer shall be assumed to have for retirement purposes, at least the same length of continuous commissioned service in the Regular Army as any officer junior to him on the promotion list: *Provided further*, That the number of years of service to be credited in computing the right to retirement and retirement pay in the case of officers retired by reason of having reached the age of sixty years or over shall include all service heretofore credited for retirement at age sixty-four: *Provided further*, That nothing in this Act shall operate to deprive any officer of the retired rank to which he is now entitled under the provisions of law: *And provided further*, That all officers retired under the provisions of this section shall be placed on the unlimited retired list.

The above-quoted amended section 3 provides only for retirement of an officer "upon his own application" under the length of service provision, and the section also provides that "All promotion-list officers shall be retired at the age of sixty years," with certain exceptions. Plaintiff was not retired under the act of June 13, 1935; neither was he retired "upon his own application" or because of his age, but he was removed from the active list and placed on the retired list on the ground, as provided in the Joint Resolution of July 29, 1941 (55 Stat. 606), that his "performance of duty, or general efficiency, compared with other officers of the same grade and length of service" was such as to warrant

such action in the opinion of the Secretary of War (finding 6). It will be noted also that the statute of July 29, 1941, also provides that "Any officer so retired * * * who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, *shall be retired with annual pay equal to 75 per centum of his active duty annual pay at the time of his retirement;* * * *." [Italics supplied.] The fact that plaintiff, upon being removed and retired, was given the retired rank of lieutenant colonel under section 3 of the act of June 13, 1940, is not, in the circumstances, controlling as to the retired pay to which he was and is entitled. Plaintiff contends that he was retired under both the act of June 13, 1940, and the Joint Resolution of July 29, 1941, and that the act of June 13 controls as to retired pay, but the facts do not support this position. Sec. 3 of the act of June 13, 1940, specifically excluded from its provisions officers removed and retired under sec. 24b of the National Defense Act of June 4, 1920 (41 Stat. 773), and the Joint Resolution, which suspended sec. 24b during the National emergency, was a substitute for sec. 24b in effect when the act of June 13, 1940, upon which plaintiff relies, was enacted. This is shown by the fact that sec. 24b and the Joint Resolution were dealing with the same subject matter; i. e., involuntary removal and retirement of commissioned officers. In effect, the Joint Resolution was an amendment, during the period of the National emergency, of sec. 24b which it suspended during such period. Sec. 24b, as amended June 4, 1920, provided that "The President shall convene a board, * * * which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service." That section made further provision for either the discharge of Class B officers or for the retirement and for retired pay of such officers as were found eligible to be placed upon the retired list upon removal from the service.

Since plaintiff was removed and retired under the provisions of the Joint Resolution of July 29, 1941, the provisions of the act of June 13, 1940, are not applicable and

he is entitled only to the retired pay of a major and not that of a lieutenant colonel. The petition is therefore dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

J. H. CRAIN AND R. E. LEE WILSON, JR., TRUSTEES OF LEE WILSON AND COMPANY, A BUSINESS TRUST v. THE UNITED STATES

[No. 45997. Decided November 5, 1945]

On Plaintiffs' Demurrer to Defendant's Counterclaim

Agricultural Conservation Program under 1936 Act; defendant's counterclaim; determination by Secretary of Agriculture.—Where defendant's counterclaim alleges and sets forth the scheme which the Secretary of Agriculture on April 9, 1941, found that plaintiffs had adopted and carried out in order to defeat the purposes of the 1937 Agricultural Conservation Program under the Soil Conservation and Domestic Allotment Act of 1936, as applied to the lands owned by plaintiffs, and at the same time to obtain for themselves maximum grants under such program; and where the Secretary was authorized under the Act to make the findings and determination of April 9, 1941; it is *held* that defendant's counterclaim states a sufficient cause of action and plaintiffs' demurrer is overruled.

Same; determination by Secretary final.—The 1936 Act provides that the Secretary of Agriculture shall have the power to carry out the purposes of the Act by making grants to farmers in amounts which he shall determine to be fair and reasonable and that the facts constituting the basis for any such grant, when officially determined in accordance with departmental regulations, "shall be reviewable only by the Secretary of Agriculture."

Mr. George E. H. Goodner for the plaintiffs.

Mr. Scott P. Crampton was on the brief.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

LITTLETON, *Judge*, delivered the opinion of the court.

Plaintiffs brought this suit to recover $29,261.78 alleged to be due them for their compliance during 1937 with defendant's Agricultural Conservation Program under the Soil Conservation and Domestic Allotment Act of February 29, 1936 (U. S. Code, Tit. 16, secs. 590a to 590q).

The essential facts alleged in the petition are as follows:

In the spring of 1937 Lee Wilson and Company was notified in writing by the Secretary of Agriculture of the number of acres of cotton which it would be permitted to plant on its various so-called farms in 1937. Under the rules and regulations of the Department of Agriculture Lee Wilson and Company signified its acceptance of the action of the Secretary of Agriculture and of the base acreage allotments made by him upon the understanding and representation contained in the laws and the regulations to the effect that it would be compensated therefor.

That, as the result of the action of the Secretary, the cotton acreage allotted to Lee Wilson and Company on the three farms operated by it in 1937 was as follows:

Farm	*Farm number*	*Base acres allotted*
Wilson	71-047-1681	8,192
Victoria	71-047-1706	2,180
Armorel	17-080-2937	2,699
Total base cotton acreage allotment		13,071

The total acreage planted to cotton on these farms was:

Wilson	6,699.1 acres
Victoria	1,435.8 acres
Armorel	2,279.3 acres
Total acres planted	10,414.2

That in the operation of the farms in 1937, Lee Wilson and Company complied with the law and all the regulations of the Secretary regarding the conservation program. In due time the agents of the Secretary checked the farms so operated to ascertain whether there had been complete compliance with the program for 1937. Upon finding such compliance, the agents then prepared applications for payment

on a form prepared by the Secretary and presented them to Lee Wilson and Company to sign in order for it to receive its payment. Lee Wilson and Company signed the applications and filed them with the agents of the Secretary for Mississippi County, Arkansas, prior to January 15, 1938.

The applications were transmitted by the county agents to the State Administrative Office at Little Rock, Arkansas, which office determined the amounts due on such applications as follows:

Wilson	$10,407.63
Victoria	11,886.50
Armorel	6,967.65
Total	29,261.78

That the aforesaid acts of the Secretary of Agriculture and his agents and Lee Wilson and Company constituted an agreement in fact between the parties hereto, under the law and the authority reposed in the Secretary of Agriculture, resulting in a consideration and payment due Lee Wilson and Company in the amount of $29,261.78.

In addition to and without waiving any defense under its general traverse to the petition, defendant filed a counterclaim against plaintiffs for $590.64, with interest, on the ground that plaintiffs through one of their operating branches, or an agency, misled and deceived the Secretary of Agriculture and thereby received through this agency, on February 10, 1938, $590.64, to which it was not entitled under the law and the regulations made pursuant thereto.

The facts alleged in the counterclaim are in substance as follows:

Pursuant to the act of February 29, 1936, the Secretary of Agriculture, on December 31, 1936, promulgated administrative regulations entitled "1937 Agricultural Conservation Program—Southern Region Bulletin 101," and thereafter from time to time promulgated amendments and supplements thereto, which regulations as so amended and supplemented are codified in "1937 Agricultural Conservation Program—Southern Region Bulletin 101, as Amended", issued September 1, 1937. These regulations provided that grants would be made, in connection with the effectuation of the purposes of

the act, in accordance with the provisions of such regulations and such modifications or other provisions as might thereafter be made; that payments would be made for each acre diverted in 1937 from the cotton soil-depleting base at the rate of five cents for each pound of the normal per acre cotton yield as adjusted for a farm; that the cotton base would be the acreage established for a farm as that normally used thereon for the production of cotton; and that no person should be entitled to receive or retain any part of any payment if he adopted any practice which the Secretary should determine might tend to defeat any of the purposes of the 1937 program, or if such person offset, or through any scheme or device, such as operating by or through, or participating in the operation of a firm, partnership, association, corporation, estate or trust, participated in offsetting or benefited, or was in a position to benefit by such offsetting, the performance rendered in respect of which a payment would otherwise be made.

That plaintiffs, in order to defeat the purposes of this program as applied to the lands owned by them in Mississippi County, Arkansas, and still obtain maximum grants from defendant under such program, adopted and carried out a scheme to offset their performance with respect to the lands which they operated directly by leasing to tenants under plaintiffs' control and direction (at least one of whom actually farmed as an agent and employee of plaintiffs rather than as a *bona fide* tenant) in 1937 certain lands owned by plaintiffs in Mississippi County, Arkansas, which were entitled to receive comparatively small cotton bases, so that such tenants would (and they actually did) plant on the lands leased to them cotton acreages greatly in excess of the cotton bases; whereas on that part of the lands owned by plaintiffs and directly operated by them, which was entitled to receive comparatively large cotton bases, large acreages were diverted from the cotton bases. Plaintiffs permitted and encouraged their tenants to plant cotton on lands owned and operated or controlled by plaintiffs greatly in excess of the cotton bases established for such lands and thereby adopted a practice which tended to defeat the purposes of the 1937 program

and which resulted in offsetting plaintiffs' performance on the lands operated directly by plaintiffs. That one of the agencies used by plaintiffs in order to carry out this scheme was called the Keiser Supply Company, which was in fact merely an operating branch or agency of plaintiffs. In order to obtain a grant under the program, the Keiser Supply Company executed and filed with defendant an Application for Payment (Form Sr-109) dated November 27, 1937, covering lands in Mississippi County, Arkansas, owned by plaintiffs. On February 10, 1938, defendant paid to the Keiser Supply Company $590.64 as a grant for participating in the 1937 Agricultural Conservation Program, which sum inured to the benefit of plaintiffs; that this grant was paid by defendant under a mistake and without knowledge of the scheme which plaintiffs had entered into and carried out to defeat the purposes of said program by offsetting plaintiffs' own performance by the overplanting by plaintiffs' tenants and agents.

That on April 9, 1941, the Acting Secretary of Agriculture, after an investigation, made a determination pursuant to the act of February 29, 1936, that since the total acreage of cotton grown on the lands owned, operated or controlled by plaintiffs in 1937 exceeded the total cotton bases established for those lands, plaintiffs were not entitled to any grant under the 1937 program and that the grant of $590.64 which had been mistakenly and erroneously paid to the Keiser Supply Company should be returned to defendant by the Keiser Supply Company or plaintiffs.

Plaintiffs have failed and refused to return this grant of $590.64 to defendant.

Plaintiffs contend in support of their demurrer to the counterclaim that it is without substance because there are no facts alleged to support it and that it is insufficient in law because it does not state a cause of action against plaintiffs.

We think the demurrer is not well taken. The counterclaim sets forth sufficient facts to constitute a cause of action against plaintiffs under the law and the regulations promulgated thereunder. The scheme alleged to have been adopted by plaintiffs for the purpose of defeating the program set forth in the regulations to their own advantage is described,

and the findings and determination of the Secretary are detailed. Plaintiffs accepted the base acreage allotments made by the Secretary for 1937, and became bound by such allotments and by the regulations relating thereto. The counterclaim alleges and sets forth the scheme which the Secretary found plaintiffs had adopted and carried out in order to defeat the purposes of the 1937 program, as applied to the lands owned by them and, at the same time, to obtain maximum grants from defendant under such program. If these allegations are true, and they are admitted for the purpose of the demurrer, the defendant is entitled to recover under its counterclaim. The Secretary was authorized to make the findings and determination of April 9, 1941, as alleged in the counterclaim. The Secretary of Agriculture issued regulations, under authority of the Soil Conservation Act, which set forth the basis on which payments would be made to producers who complied with the 1937 Agricultural Conservation Program and which provided that such payments would be made in proportion to the reduction in cotton grown in 1937 below a farm's "cotton base"; i. e., its normal cotton acreage.

Sec. 19 of these regulations provided as follows:

> *Payments Restricted to Effectuation of Purposes of the Program.*—No person shall be entitled to receive or retain any part of any payment if such person has adopted any practice which the Secretary determines tends to defeat any of the purposes of the 1937 program, or if such person has offset, or through any scheme or device whatsoever, such as but not limited to operating by or through or participating in the operation of a firm, partnership, association, corporation, estate, or trust, has participated in offsetting, or has benefited or is in position to benefit by such offsetting, in whole or in part, the performance rendered in respect of which such payment would otherwise be made.

The act of February 29, 1936, provides that the Secretary of Agriculture shall have power to carry out the purposes of the act by making grants to farmers in amounts which he shall determine to be fair and reasonable in connection with the effectuation of such purposes, and that the facts constituting the basis for any such grant, when officially de-

termined in accordance with departmental regulations, "shall be reviewable only by the Secretary of Agriculture."

The demurrer to the counterclaim is overruled. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

GEORGE F. DRISCOLL COMPANY v. THE UNITED STATES

[No. 45455. Decided October 1, 1945. Plaintiff's motion for new trial overruled January 7, 1946]*

On the Proofs

Government contract; decision of contracting officer as to plaintiff's liability for repairs to broken water main final under the contract in suit.—Where the plaintiff entered into a contract with the Treasury Department for the erection of buildings at Ellis Island, New York; and where during its construction operations a water main was damaged by the driving of a pile as authorized and directed by the defendant; and where it was decided by the contracting officer after an investigation that plaintiff was liable for the costs and expenses which it incurred in making repairs to the broken water main and in furnishing fresh water during such repairs; it is *held* that the decision of the contracting officer, under the provisions of the contract, was final and plaintiff is not entitled to recover.

Same; authority of contracting officer under Article 15 of contract in suit.—The decision of the contracting officer consisted of a decision on matters of fact, as well as matters relating to the proper interpretation of the contract, drawings and specifications, and under the provisions of Article 15 of the contract in suit his authority to decide the dispute included both questions, and his decision, from which plaintiff took no appeal, was final.

Same; claim in suit involves dispute under the contract.—The claim which plaintiff made to the contracting officer, and on which the instant suit is based, involves a dispute which arose under the contract which the contracting officer was not only authorized but was required to decide under the provisions of Article 15 of the contract in suit.

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*Plaintiff's petition for writ of certiorari pending.

Same; no charge of erroneous decision implying bad faith.—Even if the decision of the contracting officer, from which plaintiff took no appeal, had been grossly erroneous, it could not be set aside by the Court of Claims unless the court was justified from the evidence in finding that it was so grossly erroneous as to imply bad faith, and no such evidence has been adduced nor such claim made by plaintiff.

The Reporter's statement of the case:

Mr. Joseph J. Cotter for the plaintiff. *Messrs. Arthur J. Phelan* and *Hogan & Hartson* were on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff sues to recover $7,787.12, representing expenses which it incurred in making repairs to a water main damaged by the driving of a pile during its construction operations under a contract with the Treasury Department for the erection of buildings at Ellis Island, New York.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a New York corporation, and was at all times mentioned herein engaged in the general construction business as a general contractor.

2. Bids were opened October 8, 1934, for certain construction work to be done at the U. S. Immigration Station at Ellis Island, New York, consisting of the building of a ferry house, a reception building, several covered passageways connecting these buildings with the buildings that were already there, an addition to the laundry building, and a number of alterations of different kinds in several of the other buildings.

3. Plaintiff was awarded a contract by the Public Works Branch of the office of the Director of Procurement, Treasury Department, a written contract being executed by the parties on October 22, 1934.

4. The two contract items directly involved in the present issue are pile work and plumbing.

The pile work consisted principally of wood piling for the foundations of the covered passageways and the laun-

dry building. With respect to the driving of the piles, the specifications provided as follows:

> 108. DRIVING.—Piles shall not be driven until after the excavation is completed. Piles shall be driven to the required bearing value or values as determined by the formula for bearing values specified herein. All piles shall be driven in the presence of the construction engineer. The driving shall be continuous for each pile from the time of starting until the required bearing value has been reached. Caps, collars or bands shall be provided and used as necessary to protect the piles against splitting and brooming.

5. A substantial amount of new plumbing, including connections to existing pipe lines and new pipe lines, was to be installed by plaintiff under the contract, and as the buildings on the site were to be occupied during the carrying out of the contract it was necessary to maintain the water, sewer, steam and electrical supply to these buildings during the performance of the contract. The contract required plaintiff to install and connect a riser to an already existing 8-inch underground water main from New Jersey, the riser to be in turn connected to new service pipes furnishing water both to the existing building and the buildings to be erected.

The following portions of the specifications relate more particularly to the plumbing and water supply system:

> 987. PRESENT SERVICE PIPES, ETC.—All the buildings now on the site will be occupied during the construction of the buildings, etc., under this contract and this contractor must maintain the cold water, hot water, sewers, steam supply, electric services, and all other services not mentioned herein, supplying these buildings.
>
> 988. Especial attention is called to the fact that piping, conduits, and traps, etc., in place in present covered walks, etc., are not shown on drawings, and bidders should visit site to fully inform themselves of the conditions.
>
> 989. Where services are encountered in excavations, etc. (including excavations for buildings) they must be offset and reconnected by this contractor so as to furnish uninterrupted services to the occupied buildings. Any abandoned or dead service pipes encountered must be removed to outside of excavation and be plugged tight as directed.

1003. SCOPE OF WORK.—This section of the specification includes the furnishing of all labor and materials required for the installation complete of the changes in the extensions to the plumbing, sanitary drainage and water supply inside the buildings, covered walkways, the water supply and sewer systems outside the buildings including connections to the present water mains and sewers, etc., all as indicated on drawings hereinafter specified or as may be necessary for the fulfillment of this contract. Contractor is to make changes, etc., in connection with present services as hereinbefore specified, under "Mechanical Equipment," and as may be necessary, so that same will operate in a first class manner. Attention is called to the fact that methods of connecting to present services are not indicated on drawings, and this contractor must make the necessary connections subject to approval of construction engineer.

1051. WROUGHT IRON OR STEEL WATER SUPPLY PIPE FITTINGS AND CONNECTIONS.—(See p. 12 and Federal Specification, F. S. B. Specification Nos. WW–P–431 and WW–P–441).—Contractor is to furnish and install in the covered passages a wrought iton [iron] or steel fresh water supply main as indicated on drawing.

1052. New piping is to be connected to the present services complete.

1055. CAST IRON WATER SUPPLY FITTINGS AND CONNECTIONS.—Contractor is to furnish and install complete the 8-inch underground cast iron fresh water supply main, and the cast iron salt water fire lines in the covered walks and the new buildings, all as indicated on drawings and necessary for complete system.

1056. The new underground main is to be connected to the present supply piping complete where indicated on drawing.

1075. WATER SUPPLY SYSTEM.—Contractor must furnish all labor and material necessary to extend the present water supply system and the fire protection in place to the new buildings, all as indicated on drawings and hereinafter specified. The new mains are to be connected to the present mains where indicated on drawings. Run branches to each building new and old where shown and necessary; underground main to be run at elevations shown and where elevation is not shown must be not less than 3 feet below existing grade.

6. Paragraph 1 under the heading "General Requirements" of the specifications lists by number the contract drawings,

one of which relates to plumbing and heating and is largely diagrammatic in character.

At the top central portion of this drawing was shown a vertical line bearing the legend "8-inch water pipe in place from New Jersey."

A conventional symbol indicating a new vertical riser was shown on this pipe just outside of the wall of a covered passageway to be constructed. The drawing indicated as new construction a horizontal pipe leading from the vertical riser and extending through the wall of the passageway and to a location inside, where it was connected to service pipes for the fresh-water supply.

This diagrammatic drawing gave no dimensional data which would indicate the location of the existing underground water main with reference to the wall of the passageway, the depth of the same underground, or the height of the new riser to be installed.

7. Another contract drawing, No. 5–401, shows the foundation details of the covered passageways. In the portion of the passageway wall, which crossed the fresh water main, it specified the piles as located on 6-foot centers.

This drawing disclosed in no way either the supposed or actual location of the underground water main with reference to the wall of the passageway and the required pile work therefor.

8. Paragraph 2 under the title "General Requirements" of the specifications referred to a second set of drawings by number. This paragraph made reference to these drawings as relating to conditions of the site and stated with reference to them that they—

> are not to become contract drawings. They are furnished bidders only for such use as they may choose to make of them. The accuracy of data given on these drawings is not guaranteed.

Two of these drawings disclose details where the 8″ fresh-water pipe passed through the seawall. These drawings also indicate that at this point this pipe was located below ground at an elevation of about minus 23′. The seawall was approximately 100 or 125 feet distant from the line of piles to be driven for the foundation of the passageway wall, and

a paint mark had been placed on the wall in connection with a prior contract to indicate the location at which the fresh-water pipe passed through the seawall. At a point approximately 5 feet the other side of the line of piles a riser which was connected to the 8″ fresh-water main projected above the ground.

9. After the pile driver had driven several piles on 6-foot centers for the foundation wall of the covered passageway, it approached a point where it became apparent that the next pile to be driven would be very close to the supposed location of the underground water main. This location was determined by sighting from the riser from the 8-inch water main to the place on the seawall where it was known the water main entered the Island. As it later developed, however, the water main did not follow a straight course from the seawall to the riser, but, instead, followed an irregular course to the west of a straight line between the riser and the mark on the seawall. This fact was not known to either of the parties; but since, sighting along the ground, it appeared that the main was below the point designated for the driving of the pile, plaintiff before driving the pile asked the defendant's superintendent of construction for instructions.

Accordingly, a conference was held between the Government engineers and representatives of the contractor to determine what should be done in connection with the pile in question. Present at the conference were plaintiff's construction engineer and plaintiff's superintendent, and defendant's construction engineer and assistant construction engineer. At this conference defendant's construction engineer suggested to plaintiff that it dig down into the ground at a place near where the pile was to be driven and locate the water main, and at this place make a connection to the water main for the other pipes which plaintiff was required to install under its contract. Plaintiff, however, protested against this, on the ground that its contract only required the laying of the pipe 3 feet under the ground and that this provision of the contract could be complied with by connecting to the vertical riser from the water main projecting above the surface of the ground. Defendant's construction engineer did not insist upon this suggestion, and he then indicated a

place on the ground where he desired the pile to be driven, which was 2 feet and 6 inches from the place designated on the plans; but before driving the pile at this place plaintiff was instructed to probe into the ground at this point with a rod in order to determine whether or not the main was below the point designated.

10. There was also present at the above-mentioned conference a Mr. Booth, who was the assistant superintendent in charge of Ellis Island. At this conference Mr. Booth stated that he thought that the water main would be found at an elevation of about minus 10 feet. This was the only information available as to the depth of the main. Following the instructions given, plaintiff's workmen or representatives then took a 12-foot reinforcing rod for probing operations and drove the rod in the bottom of a trench 5 feet deep at various points approximately 4 inches apart over the place tentatively selected for the driving of the pile. The rod could not be fully driven into the ground as it was necessary to leave 6 inches or a foot projecting so that the rod could be withdrawn. The rod was driven to a total depth of 16 feet and 6 inches below the surface of the ground.

Defendant's assistant construction engineer authorized plaintiff to drive the pile at the point indicated by the stake. Thereupon, plaintiff drove the pile, the point of which, upon reaching an elevation subsequently determined to have been minus 16.75 feet, broke the water main. This was on May 1, 1935.

11. The break in the water main was not at once apparent. Plaintiff's office in Brooklyn was informed late that afternoon over the telephone by its superintendent at the job that the water pressure on Ellis Island was dropping and that it looked as though the water main was broken.

The next morning there was absolutely no water supply and there were many buildings on the Island that were in urgent need of water and the supply in their tanks would last only a short time. At that time the Government construction engineer orally instructed the contractor's superintendent to proceed to repair the pipe. Plaintiff never received any specific order in writing to make the repairs,

but the oral instructions were confirmed by letter of May 11, in reply to plaintiff's letter of May 3.

12. Plaintiff, in view of the emergency situation, immediately made arrangements to haul water by tugboats to the Island, and as soon as possible procured over 1,000 feet of fire hose, extended it from the Island under the water to a point on the New Jersey shore, where connection was made to a water main, and supplied water in that manner.

Plaintiff immediately set to work to repair the break as quickly as possible. It took approximately one week working twenty-four hours a day to repair the broken main.

After working the first day and digging a pit 12 feet square, the plaintiff encountered sea water. It was then found necessary to sheet-pile and timber the pit and to drive the sheeting down a sufficient depth to hold the water and to permit further excavation.

During the course of the repair work the water broke through the walls at the bottom of the pit and it was necessary to employ a diver to complete the repair.

The break occurred on May 1, 1935. The emergency repair work started on May 2, 1935. On May 7, 1935, the water main was reconnected. Clean-up work was done at various times up to May 29, 1935.

13. On May 3, 1935, and while the repair work was in progress, the plaintiff addressed a communication to the construction engineer in charge of the Ellis Island project reading as follows:

> On Wednesday May 1st, in the driving of wood piles for the North wall of the passageway of Pavilion A, it appears that a water main at this point was struck and broken.
>
> Due to this, we were forced to proceed immediately with men and equipment to make repairs to the main. In addition to this, it was necessary to supply water by boat to the Buildings in use at Ellis Island.
>
> The extent of the damage has not yet been determined. We do not believe that the water main which we may have struck is located at the point indicated on the drawings, as the piles were driven in the presence of the Assistant Construction Engineer.
>
> If it is established that the main is not as indicated on the drawings, and, because of this the damage oc-

curred, we shall expect to be reimbursed for all costs of repairs made necessary by the break, in accordance with paragraph 88 of the specifications.

May 11, 1935, defendant, through its Chief Engineer, replied to plaintiff's communication by a letter in which reference was specifically made to paragraphs 987, 988, 989 and 1003 of the specifications, which were quoted in the letter (see Finding 5). The letter further stated:

> If all the above-mentioned paragraphs of the specifications had been followed, the damage to the water main would not have occurred, and it is the writer's opinion that there can be no possible claim for additional compensation for the repair of this damage.

14. June 5, 1935, plaintiff wrote to the Procurement Division, Public Works Branch, submitting a detailed statement of costs with a change proposal and requesting payment for the actual cost of the extra work in connection with the breakage of the water main in the sum of $7,006.62 which, together with overhead of 10 percent and profit of 10 percent, aggregated the sum of $8,478.00.

On September 16, 1935, the Procurement Division, through the Acting Assistant Director of Procurement, notified plaintiff in writing, after an investigation and consideration of the merits of plaintiff's claim, that the additional expense incurred in the repair of the broken water main would have to be assumed by plaintiff, and that plaintiff's proposal of June 5, 1935, was rejected. The letter from the Procurement Division further stated—

> This office will interpose no objection, in the event you desire to present an appeal from this decision to the office of the Comptroller General of the United States.

15. The contract between plaintiff and defendant contained the following with respect to disputes:

> ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized repre-

sentative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Plaintiff did not appeal to the Secretary of the Treasury from the action of the Procurement Division.

Plaintiff subsequently submitted the matter to the Comptroller General, who on May 12, 1939, denied the claim.

16. As the result of the work done under the instructions of defendant and because of the emergency that developed in connection with the breaking of the water main, plaintiff incurred and paid the following expenses or used its own equipment at reasonable rental rates:

32 hours Superintendent @ $1.75	$56.00
98½ hours Timekeeper @ $0.625	61.56
16 hours Labor Foreman @ $1.00	16.00
43 hours Skilled Laborer @ $1.00	43.00
53 hours Common Laborer @ $0.50	26.50
178 hours Hoisting Engineer @ $1.65	293.70
109½ hours Fireman @ $1.125	123.18
128 hours Carpenter Foreman @ $1.50	192.00
190 hours Carpenters @ $1.40	266.00
429½ hours Concrete Laborers @ $0.9375	402.64
74 hours Excavating Laborers @ $0.825	61.05
75 hours Dock Builder @ $1.40	105.00
12 hours Diver @ $1.875	22.50
Compensation Insurance on $1,649.13 @ $17.7562	292.82
550 gallons gasoline @ $0.135	74.25
118 hours Crane rental @ $5.00	590.00
1 week 4-in. Centrifugal pump @ $35.00	35.00
90 Feet 4-in. Suction Hose rental @ $0.30	27.00
Trucking	15.00
Endres Plumbing Corporation—Repairs to broken water line and reconnecting same	810.27
Berkshire Electric Co.—Temporary lighting installation	11.42
Goodall Rubber Company—2½" fire hose and couplings	606.90
Tisdale Lumber Company—Timber for sheathing	337.23
Dalzell Towing Company—Water supplied to Ellis Island	1,017.50
Central Railroad Company of New Jersey—Water supplied to Ellis Island	316.21
A. M. Hazell, Inc., Equipment rental	213.13
Edward Ehrbar, Inc., Equipment rental	318.43

Miscellaneous—	
Telegraph and telephone	3.80
Meals	11.55
Demurrage on scow—7 days @ $12.00	84.00
Petty cash	2.00
	6,435.64

17. The reasonable addition of 10 per cent for overhead and 10 percent profit to the sum of $6,435.64 given in the previous finding results in a total amount of $7,787.12.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff and defendant entered into a contract for the erection by plaintiff of certain buildings on Ellis Island. One building was to be erected upon piles. The provision of the specifications relating to driving of the piles is set forth in finding 4. It provides that "All piles shall be driven in the presence of the construction engineer." The contract drawings furnished by defendant designated the places at which these piles were to be driven. After plaintiff had driven certain piles in accordance with the drawings and was ready to drive another, it discovered that, if driven at the place designated on the drawings, this pile would probably strike an 8-inch underground water main which supplied the Island with water.

Defendant had a construction engineer, Paul H. Heimer, in charge of the work as the representative of the contracting officer. The contracting officer was the Director of Procurement of the Treasury Department. The construction engineer had an assistant, R. S. Eyres, in charge of the work at the site. Plaintiff called the attention of the construction engineer to the fact that if the next pile should be driven as shown on the drawings it might strike the underground water main. Thereupon a conference was held, at which plaintiff's construction engineer and its superintendent and the defendant's construction engineer and his assistant construction engineer were present, the results of which are set forth in findings 9 to 14, inclusive.

After probing for the water main, as stated in the findings, at a point indicated by the construction engineer, but different from the point at which the drawings showed this pile should be driven, plaintiff, with the approval of the assistant construction engineer in charge of the work, drove the pile at that point. When the pile was so driven it struck the water main and broke it. The break in the water main was not at once apparent. By the next morning, May 2, there was no water supply and many Government buildings on Ellis Island were in urgent need of water; the supply in their tanks would last only a short time. The construction engineer ordered plaintiff to make necessary repairs to the water main. Plaintiff at once, in view of the emergency situation and the orders of defendant's construction engineer, set to work to repair the break as quickly as possible and, also, under like orders, made arrangements to haul water by tugboats to Ellis Island; in addition it procured over one thousand feet of fire hose, extending it from the Island, under the water, to a point on the New Jersey shore, where connection was made to a water main. In this manner water was supplied to Ellis Island until the broken main had been repaired. It required approximately one week, working 24 hours a day, to repair the broken main. Plaintiff at all times denied responsibility for the breaking of the water main and, on May 3, plaintiff made claim, as set forth in finding 13, for reimbursement of all costs of repairs made necessary by the break in the water main. On May 11, the construction engineer, as set forth in finding 13, denied its claim for reimbursement, and confirmed the directions previously given to plaintiff to furnish water and repair damage to the water main.

On June 5, after this work had been completed, plaintiff submitted to the contracting officer an itemized claim for the costs incurred and this claim was denied by the contracting officer, from which no appeal was taken by plaintiff to the head of the Department.

Article 15 of the contract, quoted in finding 15, made the decision of the contracting officer, subject to appeal to the head of the Department, final and conclusive as to "All disputes concerning questions arising under this contract."

The contracting officer upon consideration of plaintiff's claims of May 3 and June 5 and all the facts submitted by plaintiff, and those obtained as a result of his own investigation, decided that plaintiff, and not the Government, was responsible for locating the water main before driving the pile which resulted in its being broken, and that under all the facts and circumstances plaintiff was responsible for the cost of making necessary repairs and for furnishing the Government with fresh water until the repairs had been completed.

Plaintiff does not claim and has submitted no proof to show that the decision of the contracting officer was so grossly erroneous as to imply bad faith, and it is clear that such a claim could not be made. Plaintiff argues that the contracting officer's decision was conclusive only as to matters of fact and that the decision which was made consisted merely of conclusions of law. It is contended that the decision was not final as to matters of law relating to the interpretation of the contract. Under article 15 this contention cannot be sustained. The decision of the contracting officer consisted of a decision on matters of fact, as well as matters relating to the proper interpretation of the contract, drawings, and specifications, and his authority to decide the dispute included both questions.

We think the claim which plaintiff made to the contracting officer, and which it makes here, involves a dispute which arose under the contract which the contracting officer was not only authorized but was required to decide under the provisions of article 15. Except for this, plaintiff would be entitled under the findings to recover $7,787.12, as set forth in findings 16 and 17. However, we are of the opinion that the decision of the contracting officer, from which plaintiff took no appeal, was final.

The contracting officer under the contract provisions and on the facts, as he interpreted them, decided the dispute against plaintiff and, even if the decision had been grossly erroneous, we could not set it aside unless we were justified from the evidence in finding that it was so grossly erroneous as to imply bad faith. Plaintiff submitted a claim and complete statement of facts and argument in support thereof.

The contracting officer secured a report from the construction engineer, after which he had a further investigation made of the facts and circumstances by holding a hearing with plaintiff on its claim at the site of the work, and, subsequently, appointed a committee to consider and make recommendation upon the claim before he rendered his decision. Upon the record thus made he honestly and in good faith reached the conclusion that upon the facts and under the terms and conditions of the contract the plaintiff, rather than the Government, was responsible for the break in the water main and for the cost of repairing the damage thereto. In his decision sent to plaintiff he stated as follows:

> * * *. Supplementing your proposal of June 5, wherein you submitted statement for $8,474.00 for this work, on July 17, you submitted further information and asked favorable consideration for reimbursement.
>
> Subsequent to the conference between the representatives of this Office and yourself at the site, the committee of Government representatives reviewed the terms of your contract in the light of the evidence presented and finds the responsibility for the additional expense, which was incurred by you in the repair of this broken water main, is for your assumption, and your proposal that the Government compensate you therefore is hereby rejected.

The petition must therefore be dismissed. It is so ordered.

WHALEY, *Chief Justice*, concurs.

JONES, *Judge*, concurring:

I concur in the result on the ground that plaintiff was at fault in not driving a rod or otherwise exploring to the full depth that it intended ultimately to drive the pile. It knew the water main was in that area and, in view of the obligations of the contract, should have exercised this precaution.

WHITAKER, *Judge*, dissenting:

The majority say that plaintiff would be entitled to recover the sum of $7,787.12, except for the adverse ruling of the contracting officer and plaintiff's failure to appeal there-

from. I think it is entitled to recover this amount and I do not think the ruling of the contracting officer bars it from doing so.

The work of repairing this broken main was not a part of the contract and, hence, is not governed by its terms. The provisions of article 15 have no application to the dispute as to who should pay for the cost of repairing it. This article gave to the contracting officer authority to decide only those disputes that arose under the contract. This work was not a part of the contract and, therefore, the dispute over who should pay for it does not arise under the contract.

The most that can be said is that this work was made necessary by the manner in which the contract was carried out. If the plaintiff was negligent in its performance and thereby broke the main and made necessary this work, it should pay for it; on the other hand, if the defendant was responsible for its breakage, then it should pay for the cost of its repair. This is a dispute over whether the plaintiff or the contracting officer was responsible for an act that caused damage to defendant's property. I do not think the parties intended to leave to the contracting officer the settlement of such a dispute.

It is almost impossible for a party charged with wrongdoing to be wholly impartial in deciding whether or not it or the other party was guilty of the wrong. The breaking of this main was the fault of either the contracting officer or of the plaintiff. The contracting officer would be a most unusual man if he could decide, wholly without bias, whether he or the plaintiff was at fault. I do not think the plaintiff intended to give him such authority.

The Act of Congress establishing this court gave the plaintiff the right to come to it for a settlement of such a dispute. I cannot believe that when it agreed to article 15 of the contract the plaintiff meant to forego this right and give to the other party final and conclusive authority to decide such a dispute.

I do not believe the defendant intended to ask it to forego this right; nor do I believe that it had a right to do so. Can it be that an agent of the executive branch of the Government has a right to take away from a plaintiff a right

given him by Congress? Has he the right to say, we will award you this contract only if you agree to forego this right Congress has given you of resorting to the Court of Claims for a redress of your grievances?

In *Beuttas et al.* v. *United States*, 101 C. Cls. 748 [reversed in part and affirmed in part, 324 U. S. 726], the issue was whether or not the defendant had paid plaintiffs all it had agreed to pay under the contract. The contracting officer decided it had. This was said to be final and conclusive. A majority of the court held that it was not. We said, upon the authority of a number of cases there cited, that an agreement made in advance of the controversy that deprived a party of recourse to a court having jurisdiction of the controversy, over whether or not the defendant had breached its contract by not paying all it had agreed to pay, is contrary to public policy and void. See pp. 767–770. The decision of the majority in the instant case is, I think, in direct contradiction to our holding in the *Beuttas* case. If the decision of the majority in that case was right, it is wrong in this. Also compare *Langevin* v. *United States*, 100 C. Cls. 15.

I do not believe the contracting officer had the right to decide the dispute over whether he or the plaintiff was responsible for breaking this main. In my opinion his decision does not foreclose the plaintiff and it is entitled to recover.

MADDEN, *Judge*, dissenting:

I agree that the plaintiff should recover. The determining fact, in my view, is that the pile was driven with the concurrence of both parties. If, in view of the probing that had been done, the driving of the pile was not a careless act, then the plaintiff was not careless, and the loss was due to an accident. If, on the other hand, it was careless conduct to drive the pile where it was driven, the Government, through its Assistant Superintendent of Construction, joined in the conduct, and could not have sued the plaintiff for the consequences of that conduct. At that point, then, the loss lay on the Government. When it ordered the plaintiff to repair the damage, it ordered it to do something which the

plaintiff was under no duty to do. The Government should, therefore, pay for the doing of it.

It is urged that the contracting officer's decision adverse to the plaintiff prevents any recovery here, under Article 15 of the contract. The issues between the parties should have been whether the plaintiff's breaking of the Government's water pipe was negligent, i. e., tortious and, if so, whether the concurrence of the Government's agent in the plaintiff's conduct was such as to prevent the Government from recovering its loss from the plaintiff. These issues, in a trial, might be left to a jury, but only after the jury had been carefully instructed by a judge as to the standards of conduct required by the law before it imposed a liability or sanctioned a defense. There is no indication in the record that the contracting officer ever thought of these issues, or was competent to resolve them if he had thought of them. Instead he read the contract literally, concluded that it required the plaintiff to keep the water running through the pipe, and therefore decided that the plaintiff had not done more than was required of it by the contract when it repaired the break in the pipe. It is said that he applied himself earnestly and diligently to the resolution of the dispute, but that hardly makes up for the fact that he did not know what the issue was.

I agree that this is not a "dispute concerning a question arising under this contract" within the meaning of article 15. The contract provision concerning the maintenance of the water service had nothing to do with the question. Only the fact that the plaintiff, when it broke the Government's pipe, was engaged in the performance of a contract, created any appearance of a relation between the breaking and the contract. To so interpret article 15 as to encompass this dispute seems to me to stretch it beyond its expressed intent, and far beyond any actual intent which could reasonably be imputed to the contracting parties. It is orthodox doctrine that arbitrators may make decisions only within the authority granted them in the agreement to arbitrate, and that the question whether a subject matter is within their authority is not for the arbitrators to decide, but for the court, even though the arbitration agreement purports to cover "all disputes."

B. Fernandez and Hnos., S. en C., v. *Rickert Rice Mills, Inc.*, 119 F. (2d) 809, 1 Cir.; 136 A. L. R. 351, with annotation on the construction of arbitration contracts; *Williston on Contracts*, § 1929. Where, as in Government contracts, the nonjudicial decision is to be made, not by a board of neutral persons, but by an agent of one of the contracting parties, the rule of construction should be at least as strict as in arbitration cases.

I think, therefore, that we have authority to decide whether the dispute which arose here was, under the contract, one for the decision of the contracting officer. I agree that it was not. On the merits I would, for the reasons I have given, decide the dispute for the plaintiff.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES AND H. WILBER BIRCKS, EXECUTORS UNDER THE WILL OF EDWARD C. KNIGHT, JR., DECEASED, v. THE UNITED STATES

[No. 45889. Decided October 1, 1945. Plaintiffs' motion for new trial overruled January 7, 1946]*

On the Proofs

Estate tax; failure to include in trust instrument provision for conditions which did occur; determination of Commissioner proper.—Where decedent, Edward C. Knight, Jr., in June, 1912, established a trust to which he transferred certain property under an instrument giving successive life interests to decedent and to his daughter, Clara W. K. Colford, and providing for the further disposition of the trust property upon the death of Mrs. Colford under three different described conditions, to wit, (1), her death after grantor's death, leaving children or descendants of children; (2) her death, in grantor's lifetime, without descendants; (3) her death, after grantor's death, without descendants; and where in the trust instrument no provision was made for the disposition of the property under the condition which did occur, the death of Mrs. Colford, leaving descendants, during the lifetime of grantor; it is *held* that the Commissioner of Internal Revenue properly included in the gross estate of the decedent, subject to estate tax, the property held in the trust and plaintiffs are not entitled to recover.

*Plaintiff's motion for leave to file second motion for new trial overruled January 26, 1946.

Same; effect of trust instrument.—The trust instrument, in the circumstances which in fact occurred, made no disposition of the property at all except that of the life estates to Knight and Mrs. Colford.

Same; not permissible for the court to supply omission in trust deed.—It is not permissible for the court to fill in a complete gap in a deed in order to make a disposition of the trust property which the grantor did not, by his language, make, but which he probably would have made if he had thought of it.

Same; decree of State court approving distribution of trust property not binding as to taxability for Federal purposes.—A consent decree of the Pennsylvania court which had supervision of the trust, on a petition presented by all interested parties, including the trustee as well as the executors of decedent's estate, approving the distribution of the property, as if it had been covered by the trust deed, is not binding upon the United States Government with respect to the taxability of the transaction nor upon the Court of Claims in a contested case between different parties.

Same; grantor was complete owner, by reversion, of trust property at his death.—The trust deed made no disposition of the property beyond the two life estates, in the event which occurred, and accordingly from the time that Mrs. Colford's life estate was extinguished in 1924 by her death, Knight had a life estate by the terms of the deed as well as a resulting trust of the undisposed of reversion; and he was therefore, in equity, the complete owner of the property at the time of his death, in 1936; and the estate tax should apply.

The Reporter's statement of the case:

Mr. Frank J. Albus for the plaintiffs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows upon an agreed statement of facts entered into between the parties:

1. The plaintiffs are the duly qualified and acting executors of the estate of Edward C. Knight, Jr., deceased. The Pennsylvania Company for Insurances on Lives and Granting Annuities is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania. H. Wilber Bircks is an individual and a citizen of the United States.

2. On October 21, 1937, the plaintiffs filed with the Collector of Internal Revenue a Federal Estate Tax return for the estate of Edward C. Knight, Jr., showing a gross estate of $2,691,897.37 and deductions of $587,091.25, with a resulting tax liability of $475,041.84, which was duly paid to the Collector of Internal Revenue on October 21, 1937.

3. Thereafter, as a result of an examination of the aforesaid Federal estate tax return by an agent in the employ of the Bureau of Internal Revenue and as a result of protest filed by the plaintiffs and conferences held with the said agent, it was determined that the net taxable estate under the Revenue Act of 1926 was in the amount of $1,607,142.03 and $1,667,142.03 under the Revenue Act of 1932, upon which there was due a tax liability of $362,585.49 as compared with the $475,041.84 paid at the time the return was filed, resulting in an overpayment of $112,456.35. The aforesaid overpayment of tax was based upon a reduction in the value of the real estate of the decedent by the sum of $404,200 and other minor adjustments. The adjustments which resulted in the determination of the overpayment in the amount of $112,456.35 are not in controversy in this action.

4. By letter forwarded to the plaintiffs under date of December 7, 1939, the defendant, through the Internal Revenue Agent in Charge at Philadelphia, Pennsylvania, notified the plaintiffs of a proposed overassessment against the estate of Edward C. Knight, Jr., in the amount of $112,456.35. In this letter the said Internal Revenue Agent in Charge further advised the plaintiffs that due notification of the adjustments reflecting the overassessment of $112,456.35 was forwarded to the Commissioner of Internal Revenue at Washington, D. C., under date of January 4, 1940.

5. Later the Commissioner of Internal Revenue recomputed the estate tax liability of the estate of the decedent and included in the gross estate certain assets held by The Pennsylvania Company for Insurances on Lives and Granting Annuities, as trustees, under a deed of trust dated June 28, 1912. This trust property had a value at the date of death of the decedent of $121,288.21, and the inclusion of this amount in the gross estate resulted in reducing the overpay-

ment of estate tax to $72,857.68 from $112,456.35 as had been previously determined. In due course the overpayment of $72,857.68, together with interest, was refunded to the plaintiffs by the Commissioner of Internal Revenue.

6. On October 17, 1940, plaintiffs filed a claim for refund of estate tax with the Commissioner of Internal Revenue, through the office of the Collector of Internal Revenue at Philadelphia, Pennsylvania, the material parts of which read as follows:

> Under date of June 15, 1939, the Internal Revenue Agent-in-Charge at New Haven, Connecticut, advised the Executors of this estate (Estate of Edward C. Knight, Jr.) that the net taxable estate under the 1926 Act had been tentatively determined in the amount of $2,051,062.28, while under the 1932 Act it was reflected in the amount of $2,111,062.28 with estate tax liability in the total of $537,971.70.
>
> As the result of protest statement filed with the said Revenue Agent-in-Charge and subsequent conferences with respect thereto in the office of the Internal Revenue Agent-in-Charge in Philadelphia, Pa., the net estate under the 1926 Act was revised to $1,067,142.03 and $1,667,142.03 under the 1932 Act, upon which estate tax liability was indicated in the total of $362,585.49, as compared with $475,041.84 paid at the time the return was filed. Notification of the recomputation of the liability, and the basis upon which the liability was redetermined, was contained in letter addressed to the agent of the taxpayer under date of December 7, 1939. The Agent of the taxpayer has been further advised that due notification of the adjustments reflecting the overassessment of $112,456.35 was forwarded to the Commissioner of Internal Revenue by the Internal Revenue Agent-in-Charge at Philadelphia under date of January 4, 1940.
>
> After the determination of the adjusted liability in the total of $362,585.49 and while the matter was under consideration in the office of the Commissioner of Internal Revenue, the United States Supreme Court promulgated its decision in the matter of Helvering v. Hallock as the result of which the Commissioner instructed the Philadelphia office to reopen the matter of the determination of this estate and include as taxable property certain assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee, on the date of death, under irrevocable deed dated June

28, 1912, which property had a total value as of July 23, 1936, of $121,288.21.

A recomputation, giving effect to the said adjustment, indicates a total liability in the amount of $402,184.16 and results in a reduction of the recommended over-assessment to $72,857.68. A so-called "Acceptance of Proposed Overassessment" was executed by the agent of the taxpayer under date of September 17, 1940.

However, it is now the taxpayer's contention that a further allowance should be made in the amount of $53,238.67 indicating a total overassessment of $126,-096.35. This claim for additional allowance is based on two adjustments: first, the elimination from the net estate of the $121,288.21 trust property conveyed to an irrevocable trust on June 28, 1912, inasmuch as it is not considered to be properly includible on the authority of the so-called Hallock decision, and second, the allowance, as an additional deduction, of $31,000.00 fees paid or incurred for attorneys and appraisers in connection with the adjustment of this matter, in accordance with the decision of the United States Board of Tax Appeals in the matter of Margaret Gordon Myers, Executrix of the Estate of Theodore F. Myers, v. Commissioner, Docket #90553.

While, as indicated, $72,857.68 of the total refund requested herein has been recommended by the proper executive of the Internal Revenue Bureau, this claim is being filed in the total amount as explained for statutory purposes and to avoid the bar of the statute in any subsequent action that may become necessary or desirable.

7. By certificate of overassessment dated August 18, 1942, the Commissioner of Internal Revenue advised the plaintiffs of the determination of an overpayment of $10,850 based upon his consideration of the claim for refund filed by the plaintiffs on October 17, 1940. The said overpayment of $10,850 was arrived at by allowing as a deduction the additional attorneys' fees in the amount of $31,000 as set forth in the second point raised in the said claim for refund. No adjustment was made by the Commissioner of Internal Revenue with respect to his previous action whereby he had included in the assets of the Estate of Edward C. Knight, Jr., the sum of $121,288.21, representing the value, at the time of the death of Edward C. Knight, Jr., of the

assets which the said Edward C. Knight, Jr., had transferred in trust by deed dated June 28, 1912. The said certificate of overassessment notified plaintiffs that their claim for refund was rejected to the extent that it was not being allowed.

The certificate of overassessment contained a paragraph reading as follows:

> This overassessment, which is subject to refund, is due to the allowance of an increase in attorneys' fees from $18,500 to $49,500. No reduction is made in the value of the taxable assets of $121,288.21, which assets were transferred in trust under date of July 28, 1912. It is the position of this office that, under the terms of the trust, upon the death of the decedent's daughter, Clara W. K. Colford, and the deaths of all of her descendants, the corpus of the trust was to be returned to the decedent, if living. No person could receive any interest or estate without surviving the decedent. There was a possibility of reverter which could not terminate without decedent's death. Accordingly, the transfer was intended to take effect at decedent's death. No part of this refund is due to credit. To the extent not herein allowed, the claim for refund is rejected.

The said sum of $10,850 covered by the certificate of overassessment referred to above was duly refunded to the plaintiffs, together with statutory interest thereon.

8. Under date of June 28, 1912, Edward C. Knight, Jr., created a trust which reads as follows:

> KNOW ALL MEN BY THESE PRESENTS, that I, Edward C. Knight, Jr., for and in consideration of the sum of One Dollar to me in hand well and truly paid, by the Pennsylvania Company for Insurances on Lives and Granting Annuities, at and before the sealing and delivery of these Presents, the receipt whereof is hereby acknowledged, as well as the assumption by said Company of the trusts hereinafter set forth, have granted, bargained, sold, assigned, transferred and set over, and by these Presents do grant, bargain, sell, assign, transfer, and set over unto the Pennsylvania Company for Insurance on Lives and Granting Annuities and its successors and assigns, all of my right, title and interest of, in and to the estate or under the Will of Clara Dwight Knight, deceased (with the exception of my interest in the jewelry which has heretofore been as-

signed to my daughter, Clara W. K. Colford), whether awarded to me by the Orphans' Court of Philadelphia County upon the adjudication of the first Account of the Executors of the said estate, or otherwise.

To HAVE AND TO HOLD the same unto the said Pennsylvania Company for Insurances on Lives and Granting Annuities, and its successors and assigns, In Trust, nevertheless, for the uses, persons, and purposes following:—

In trust, to invest and re-invest the same, from time to time, in such securities as shall be approved by me, the said Edward C. Knight, Jr., without any obligation on the part of the Trustee to confine itself to what are known as "Legal Investments," and after deducting all necessary and proper charges, to pay the net income to me, the said Edward C. Knight, Jr., for and during the term of my natural life, and, upon my death, to pay the said net income to my daughter, Clara W. K. Colford, for and during the term of her natural life.

In trust upon the death of Clara W. K. Colford, I the said Edward C. Knight, Jr., being then dead,—to pay, assign, transfer, and set over the principal to and among the children of the said Clara W. K. Colford, then living, and the descendants of any child then dead, share and share alike, per stirpes, upon the principle of representation.

In trust, in the event of the death of the said Clara W. K. Colford, in my lifetime, the said Edward C. Knight, Jr., without leaving descendants her surviving, to pay, assign, transfer and set over the principal of all of the estate hereby transferred, to the said Trustee of me, the said Edward C. Knight, Jr., absolutely and free from all trusts.

In trust, in the event of the death of the said Clara W. K. Colford after my decease, the said Edward C. Knight, Jr., without leaving descendants her surviving, to pay, assign, transfer, and set over the principal to such person or persons, for such use or uses, and in such proportion or proportions, as I, the said Edward C. Knight, Jr., may, by my last Will and Testament or any writing in the nature thereof, constitute, limit, and appoint.

This Deed of Trust is conditional upon the faithful performance by Clara W. K. Colford of a certain agreement dated the day of between Edward C. Knight, Jr., Edward W. Dwight, and The Pennsylvania Company for Insurances on Lives and Granting

Annuities, Executors and Trustees under the Will of Clara D. Knight, deceased, and of a certain agreement dated the day of between Edward C. Knight, Jr., and Clara W. K. Colford, and in the event of the breach of any covenant, agreement, or condition of either of said agreements by the said Clara W. K. Colford, this Deed of Trust shall, at my option, the said Edward C. Knight, Jr., expressed in writing and delivered to the Trustee, absolutely determine and become null and void, and the said the Pennsylvania Company for Insurances on Lives and Granting Annuities shall thereafter immediately assign, transfer, and set over the principal of all of the estate hereby transferred to the said Trustee, free and clear of all trusts.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 28th day of June, one thousand nine hundred and twelve (1912).

Sealed and delivered in the presence of: B. B. Lyons, C. A. Robbins.

[SEAL] EDWARD C. KNIGHT, JR.

The Pennsylvania Company for Insurance on Lives and Granting Annuities hereby accepts the above trust.

The Pennsylvania Co. for Ins on Lives etc.

T. S. GATES, *Vice-Pres.*

COUNTY OF PHILADELPHIA, *ss:*

On the 28th day of June 1912, before me, the Subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the above named Edward C. Knight, Jr., who, in due form of law, acknowledged the foregoing instrument to be his act and deed and desired the same to be recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

I am not a Stockholder, Director, or Officer of within mentioned Corporation.

B. B. LYONS, *Notary Public.*

Commission expires Feb. 21, 1915.

The aforesaid deed of trust was subject to the faithful performance by Clara W. K. Colford of the conditions set forth in two agreements executed by her in 1912 and which are specifically referred to in the said deed of trust. Clara W. K. Colford carried out the terms and conditions of the said two agreements.

9. Edward C. Knight, Jr., was born December 14, 1863, and died July 23, 1936. Clara W. K. Colford died on December 18, 1924, leaving to survive her two children, both of whom are still living. These children are Dorothy Colford Armstrong, who was born March 12, 1909, and Clara Knight Doreau, who was born March 22, 1913. Prior to the death of the said Edward C. Knight, Jr., on July 23, 1936, Dorothy Colford Armstrong had married and on July 23, 1936, she had one child, who had been born on September 27, 1930.

10. In December of 1927 The Pennsylvania Company for Insurances on Lives and Granting Annuities filed with the Court of Common Pleas for Philadelphia County its First Account under the deed of trust executed by Edward C. Knight, Jr., on June 28, 1912, in which it acknowledged that it was holding as trustee the property covered by the said deed of trust. Under date of September 18, 1928, the said Court of Common Pleas of Philadelphia County entered a decree approving the said account and directing that the principal of the trust property be awarded to The Pennsylvania Company for Insurances on Lives and Granting Annuities to be held by it in trust under the terms of the deed of trust dated June 28, 1912.

11. Subsequent to the death of Edward C. Knight, Jr., on July 23, 1936, The Pennsylvania Company for Insurances on Lives and Granting Annuities, as trustee under the deed of trust executed by the said Edward C. Knight, Jr., on June 28, 1912, filed with the Court of Common Pleas of Philadelphia County its Petition for Distribution, requesting the Court to authorize distribution of the trust property in accordance with the conditions of the said trust deed dated June 28, 1912. In the said Petition for Distribution it was stated that Dorothy Colford Armstrong and Clara Knight Doreau, the grandchildren of Edward C. Knight, Jr., were "each entitled to one-half of the net estate now before your Honorable Court for distribution." Joinders in the Petition for Distribution were executed by Dorothy Colford Armstrong and Clara Knight Doreau and also by The Pennsylvania Company for Insurances on Lives and Granting Annuities and H. Wilber Bircks, executors of the estate of Edward C. Knight, Jr., deceased.

12. Under date of December 14, 1936, the said Court of Common Pleas of Philadelphia County entered a decree approving the Petition for Distribution, in accordance with the said decree.

In accordance with the said decree, a schedule of distribution was prepared showing the net value of the assets in the hands of the trustees and assigning one-half of the said net assets to Clara D. Doreau and one-half to Dorothy Colford Armstrong. The said schedule of distribution was approved by the Court of Common Pleas of Philadelphia County on July 6, 1937. Distribution of the said trust property was thereupon made in accordance with the schedule of distribution approved by the Court.

13. Edward C. Knight, Jr., had remarried and at the time of his death he was survived by his widow, Marie Louise LeBel Knight. Edward C. Knight, Jr., left a will which was duly admitted to probate. Under the terms of the will of Edward C. Knight, Jr., his property was distributed under terms and conditions at variance with the terms and conditions covering the distribution of the property transferred by the deed of trust executed by Edward C. Knight, Jr., on June 28, 1912.

The court decided that the plaintiffs were not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court.

The issue in this estate tax case is whether the Commissioner of Internal Revenue properly included in the gross estate of the decedent, Edward C. Knight, Jr., certain property transferred by him in trust June 28, 1912. The basis of the Commissioner's action was that under the trust instrument there was a possibility of reverter which could not terminate until decedent's death and therefore the transfer was intended to take effect at decedent's death.

The trust instrument gave successive life interests to Edward C. Knight, Jr., and to his daughter, Clara W. K. Colford. It then provided for the further disposition of the trust property upon the death of Mrs. Colford under three different described conditions; (1) her death, after

Knight's death, leaving children or descendants of children; (2) her death, in Knight's lifetime, without descendants; (3) her death, after Knight's death, without descendants. In situation (1) the property was to go to the descendants living at Mrs. Colford's death, *per stirpes;* in (2) it was to go back to Knight; and in (3) it was to go as Knight might have appointed by a testamentary disposition.

In fact, Mrs. Colford died before Knight, and left two children, so that no one of the three described conditions covered by the trust instrument occurred. The consequence was that the trust instrument made no disposition of the property at all except that of the life estates to Knight and Mrs. Colford, in the circumstances which in fact occurred. This may well have been an oversight on Knight's part. But we think it is not permissible for the court to fill in a complete gap in a deed in order to make a disposition of property which the grantor did not, by his language, make, but which he probably would have made if he had thought of it.

It is true that, as shown in finding 11, the Pennsylvania court having supervision of the trust approved a distribution of the property as if it had been covered by the trust deed. But this approval was in response to a petition presented by all interested parties, including the executor of Knight's estate, and was nothing more than a consent decree. It represents no determination at all by a Pennsylvania court that it is the law of Pennsylvania that complete gaps in a trust deed will be filled by writing into them what would probably have been the intent of the grantor if he had given thought to the matter. We cannot, therefore, agree that the Pennsylvania court's decree binds the Government, with regard to the taxability of this transaction, or binds this court in this contested case between different parties, to follow the Pennsylvania court's consent decree.

The trust deed made no disposition of the property beyond the two life estates, in the event which occurred, and accordingly, from the time that Mrs. Colford's life estate was extinguished in 1924, Knight had a life estate by the terms of the deed and a resulting trust of the undisposed

of reversion. He was therefore, in equity, the complete owner of the property at the time of his death and the estate tax should apply.

If the court should seek to fill the gap in the trust deed with some gift of a remainder to Mrs. Colford's issue, it still would have the task of formulating the language to be inserted. It must determine whether to make, for the creator of the trust, a gift of a remainder to the descendants of Mrs. Colford who should be living at her death, or to those who should be living at the death of Knight, the time at which the interest of Mrs. Colford's descendants would take effect in possession.

A reasonable construction of the trust instrument is that if Knight had made provision for the event which in fact occurred, he would have provided, as he did in the parts of the deed which he wrote, that the interests of the descendants of Mrs. Colford should not vest until they vested in possession, upon his death. For instance, if one of the two daughters of Mrs. Colford who survived her had died before Knight, leaving a child, and creditors, Knight's intention, as shown by the provisions of his deed, would have been that the child should get the property, when Knight died, and not the creditors. Family settlements in general keep the interests contingent, so that those of the family who are alive when the time for enjoyment arrives may not find their inheritance has been dissipated without ever being enjoyed.

It is reasonable therefore to conclude that if a provision is to be written into the deed it should be that upon the expiration of the life estates of both Knight and his daughter, no matter which died first, the trustee should "pay, assign, transfer and set over the principal to and among the children of the said Clara W. K. Colford, then living, and the descendants of any child then dead, share and share alike, *per stirpes*, upon the principal of representation." The quoted language is the language actually used by Knight for one of the situations which he foresaw and provided for. If his deed is so read, the gift would have failed if the two daughters who survived Mrs. Colford had died without issue before Knight died. Until that question was resolved by Knight's death, he had an equi-

table reversion in the property, and an estate tax was payable thereon upon his death.

The decree of the Pennsylvania court, even if it had been a decision in a contested case, would have been of no assistance in this latter question of construction. The daughters who survived Mrs. Colford in 1924 survived Knight in 1936 and the court would have had no occasion, after Knight's death, to determine whether their interests had vested in 1924 or not until 1936.

It follows that the petition should be dismissed. It is so ordered.

JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

The controversy in this case arises over the inclusion within the gross estate of the deceased, Edward C. Knight, Jr., of property transferred by him in trust on the 28th day of June, 1912. The Commissioner of Internal Revenue included it in the decedent's gross estate on the theory that under the trust instrument the grantor retained a possibility of reverter and, therefore, that the transfer was "intended to take effect in possession or enjoyment at or after" the death of the decedent.

The trust instrument was executed at Philadelphia, Pennsylvania. The trustees were directed to pay the net income to the grantor for life, and upon his death to pay the net income to his daughter Clara W. K. Colford for her life, and upon the death of his daughter, the grantor then being dead, to divide the principal among his daughter's children then living, and the descendants of any child who was dead, *per stirpes*. If, however, his daughter should die during the lifetime of the grantor "without leaving descendants her surviving," the property was to revert to the grantor; and if the daughter should die after the decease of the grantor "without leaving descendants her surviving," the principal was to be paid to such persons and in such proportions as the grantor should by last will and testament provide.

The grantor died on July 23, 1936; his daughter Mrs. Colford died on December 18, 1924, leaving surviving her two children, aged 15 and 11, respectively. These children survived the grantor.

No provision was made in the trust instrument for the contingency that the daughter might die before the grantor leaving issue, and her issue should later die during the lifetime of the grantor. In this event, defendant says the property would by operation of law revert to the grantor, and it says this possibility of reverter justified the Commissioner in including the value of the property in the grantor's gross estate.

Defendant says that the right of the grandchildren to receive any part of the estate was contingent upon their surviving their mother and the grantor because the trust provided that on the death of the grantor the principal should be transferred only to such children of the daughter as should be living at her death, or, if dead, to their descendants. Therefore, it says that if the daughter's children died without issue after the mother's death, but before the grantor's death, there was no one to whom the principal could be paid and, therefore, it would revert to the estate of the grantor.

In support of this defendant cites the case of *Battenfield v. Kline*, 228 Pa. 91, 77 Atl. 416. In this case the will under construction directed that the estate "shall be divided in equal shares between such of the children" of the testatrix and her husband "as shall then be living," and that "if any one or more of the said children shall then be dead leaving issue, such issue shall stand in the place of and be entitled to the share to which such child would have been entitled if such child had survived. * * *" The court held that the children's interest was a contingent, and not a vested one, and that it did not vest until the death of the life tenants. The court said, however: "Of course this rule may be overborne by the addition of words of limitation showing that the testator's intention was that the children should take a transmissible interest; as where the gift is implied from a direction to divide among them or their heirs. Muhlenberg's App., 103 Pa. 587."

If, therefore, the trust instrument in the case before us discloses an intention that the grantor's grandchildren should receive a vested interest upon the death of their mother during the lifetime of the grantor, there was no further possibility of reverter after the death of the grantor's daughter leaving issue. I think it does.

After having provided for the payment of the income from the trust to him for his life and to his daughter for her life, with remainder to the daughter's children living at the time of her death, the grantor then provided for the contingency that his daughter should die without leaving descendants surviving her, either in his lifetime or after his death. If she died during his lifetime, it was provided that the property should revert to his estate free from all trusts; if she died after he did, it was provided that the property should be disposed of as he should by will direct. No provision was made for the disposition of the remainder if at the time of the daughter's death she left issue surviving her and her issue died before the grantor did.

What conclusion is to be drawn from this? Is it not that if she died leaving issue the remainder was then to vest in her issue? And since he made no provision for the contingency of the death of her issue after his daughter's death but before his death, is it not to be supposed that he meant the remainder to vest in them upon his death? If he had not wanted it to vest in them upon her death, would he not have made provision for the disposition of the remainder in case of their death after their mother's death but before his? His mind was on the subject of the disposition of the property in case of the daughter's death without issue both in his lifetime and after his death, and he made provision for both. He must have thought of the contingency that his daughter might die during his lifetime leaving issue and that her issue might later die during his lifetime; but he made no provision for the disposition of the remainder in that event. Why not? Because the remainder had already gone where he wanted it to go? It would seem so. He must have thought: The remainder would immediately vest in my daughter's issue, and, hence, there is nothing for me to dis-

pose of at their death; the remainder becomes theirs on their mother's death.

If he had had in mind reserving to himself the disposition of the property if both his daughter and her issue should die before he did, there was as much reason for him to have provided for the termination of the trust in the case of the daughter's death leaving issue, and their later death in his lifetime, as in the case of his daughter's death without leaving issue surviving her. But it seems he was not concerned with disposing of the remainder if his daughter died leaving issue, but only in the case of her death without issue surviving her. This must have been because, once her issue survived her, he intended the remainder to vest in them.

Now, it is quite true that the trust instrument made provision for the disposition of the remainder only in the event that his daughter should outlive him, but the probate court entered a decree based upon a construction of the instrument under which her issue got the remainder although she predeceased him. In other words, he was understood to have intended that upon his daughter's death, whether before or after his death, the remainder interest should go to her children. I think we are bound by this decree.

If I have properly divined the intention of the grantor, he could not have intended this remainder interest to take effect in possession or enjoyment only on his death. It seems to me that what has been said belies an intention that he should part with all possession and control over the property only on his death. But suppose the grantor merely failed to take into consideration the contingency that his daughter might die before he did leaving issue surviving her, and that her issue might later die before he did, and so did not provide for the disposition of the estate in that event, can it be said that he "intended" to reserve a possibility of reverter? He could not have intended this if he did not think of this contingency. It is only when the transfer is "intended" to take effect at his death that it is properly includible in a decedent's estate. *Central Hanover Bank and Trust Company* v. *United States*, 103 C. Cls. 210, opinion on motion for a new trial, decided February 5,

1945 (58 F. Supp. 565); *Estate of Mary B. Hunnewell*, 4 T. C. 1128.

In the view I take of the intention of the grantor, the case of *Fidelity-Philadelphia Trust Co. et al.* v. *Rothensies*, 324 U. S. 108, and the other cases cited by defendant are not in point.

I must respectfully dissent.

LITTLETON, *Judge*, concurs in the foregoing opinion.

CONTINENTAL OIL COMPANY v. THE UNITED STATES

ROBINSON VERRILL AS SUCCESSOR-TRUSTEE OF CONTINENTAL OIL COMPANY, A MAINE CORPORATION v. THE UNITED STATES

[Nos. 45730 and 46029. Decided November 5, 1945. Plaintiff's motion for new trial overruled January 7, 1946]*

On the Proofs

Excess profits tax; equity invested capital; exchanges of stock; basis of valuation.—Where plaintiff, an oil corporation, filed a consolidated income and excess profits tax return for the calendar year 1920 and included therein its own income and invested capital and the income and invested capital of other oil corporations which were acquired in 1920 by exchange of plaintiff's stock for the stock of the other corporations, each of the corporations in the group being considered for tax purposes as a part of the consolidated group; it is *held* that in determining invested capital the value of oil stock which was paid in for stock of the parent corporation is to be based upon the value of the assets behind such stock, as determined by the Commissioner, and not the claimed market value of the stock of the parent corporation as shown by the curb market quotations on the dates of exchange in 1920.

Same; stock included under "tangible property."—Under section 325 (a) of the Revenue Act of 1918, which includes in the definition of "tangible property" stocks, bonds and other evidences of indebtedness, the Court of Claims has held that where a corporation issues its stock for the stock of another corporation, the stock so acquired is to be considered as tangible property paid in for stock. *United Cigar Stores* v. *United States*, 62 C. Cls. 134; certiorari denied, 275 U. S. 576.

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*Plaintiff's petition for writ of certiorari pending.

Same; evidence; market quotations; oil stocks, actual value.—In the instant case little, if any, evidence was presented, to the Court or to the Commissioner, as to the cash value of the stocks exchanged for stock of the parent corporation, such as a history of earnings, assets and prevailing market prices, and plaintiff relied almost exclusively on the curb market prices for its own stock which prevailed on or about the dates of exchange; and while it is true that in many cases prevailing market quotations are an acceptable basis for determining value, in the instant case the stocks under consideration are oil stocks which are ordinarily highly speculative and, further, the corporations involved were being brought together in a new operation, and the market which prevailed was strongly supported by a group of brokers working in accordance with a restrictive agreement as to sales.

Same; speculative values eliminated.—In determining invested capital under the statute all speculative or inflationary values are to be eliminated and an actual sound value of the property paid in must be established. Cf. *La Belle Iron Works* v. *United States*, 55 C. Cls. 462; affirmed 256 U. S. 377.

The Reporter's statement of the case:

Mr. Arthur B. Hyman for plaintiffs.

Mr. Morris Katz was on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.

Mr. Robert N. Anderson and *Mr. Fred K. Dyar* were on the brief.

The separate petitions of the Continental Oil Company, a Delaware corporation, and of Robinson Verrill as Successor-Trustee of Continental Oil Company, a Maine corporation, predicate recovery upon the same claim for refund of tax and each petition prays for judgment in the same amount, namely, $62,423.32, claimed to represent an overpayment of consolidated income and profits tax for 1920 by the Elk Basin Consolidated Petroleum Company. Each plaintiff claims as a successor in interest to the Elk Basin Company which paid the tax in controversy for itself and certain subsidiary corporations whose incomes were consolidated and reported for federal tax purposes upon a single consolidated return for the calendar year 1920.

January 1, 1920, the Elk Basin Company acquired all the outstanding capital stock of two other corporations in ex-

change for 600,000 shares of its own capital stock; and on March 15, 1920, Elk Basin Company acquired all the outstanding capital stock of Mutual Oil Company of Maine and all the outstanding stock of each of its three subsidiary corporations in exchange for an additional 600,000 shares of its own stock.

The question presented is the valuation for invested capital purposes of the stock so paid in for the stock of the Elk Basin Company.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Continental Oil Company, plaintiff in No. 45730, is a Delaware corporation with its principal office and place of business in Ponca City, Oklahoma.

Robinson Verrill, plaintiff in No. 46029, is the duly appointed and qualified trustee of the Continental Oil Company, a Maine corporation (not the same corporation mentioned in the paragraph next above) dissolved by decree of the Supreme Judicial Court of Maine on December 9, 1931, with authority and power under that decree to receive and collect all assets and money due the corporation, pay all debts, and sell and dispose of the corporation's remaining assets, and to wind up its affairs. He was and is expressly authorized by court order to institute and maintain suit No. 46029.

Each of the above plaintiffs claims the same sum, $62,423.32, with interest thereon as allowed by law, and plaintiff, Robinson Verrill, admits and alleges that he is not entitled to recover if a recovery is had by Continental Oil Company. Both plaintiffs allege the same cause of action against the defendant.

2. On January 1, 1920, and for some time prior thereto and thereafter, the Elk Basin Consolidated Petroleum Company was a Maine corporation, hereinafter sometimes referred to as the "Elk Basin Company," engaged in the production, refining and marketing of petroleum and petroleum products.

3. On March 15, 1921, Elk Basin Company filed a tentative, and on May 14, 1921, filed its completed federal consolidated income and excess profits tax return for the calendar

year 1920. That return included the income of Elk Basin Company, Grass Creek Petroleum Company, Keoughan-Hurst Drilling Company, Mutual Oil Company of Maine, Mutual Oil Company of Arizona, Mutual Refining and Producing Company and Northwestern Oil Refining Company, for the entire calendar year 1920. It reported a consolidated invested capital of $8,721,214.84, a consolidated net taxable income of $1,167,974.45, and a total tax of $200,707.45, together with interest of $201.77 accrued at that time. Such tax and interest were timely assessed against and paid out of its own funds by Elk Basin Company, as parent, in installments during 1921, as follows:

Date	Tax	Interest	Totals
March 15	$30,000.00	------------	$30,000.00
May 15	20,176.86	$201.77	20,378.63
June 15	50,176.86	------------	50,176.86
Sept. 12	50,176.86	------------	50,176.86
Dec. 16	50,176.86	------------	50,176.86
	200,707.44	201.77	200,909.21

No part of the total payment of $200,909.21 above has ever been repaid by the United States to either of the plaintiffs herein or otherwise.

4. The Commissioner of Internal Revenue audited the consolidated return filed as stated in the preceding finding and determined that it erroneously included the income of Mutual Oil Company of Maine and its three subsidiaries (Mutual Oil Company of Arizona, Mutual Refining and Producing Company, and Northwestern Oil Refining Company) for the period January 1 to March 14, 1920. That determination was based upon the premise that the Mutual Oil Company of Maine and its three subsidiaries existed as a separate affiliation for the period January 1 to March 14, 1920, and had an affiliated relationship for federal tax purposes with the Elk Basin Company only from March 15 to December 31, 1920, inclusive. The Commissioner held that there were two different and separate affiliated groups of corporations; that the change in affiliation required separate computations for the fractional parts of the year 1920; that a separate consolidated return should

have been filed for the period January 1 to March 14, 1920, both inclusive, by the Mutual Oil Company of Maine for itself and its three subsidiaries; and that its income for that period should not have been included in the return filed May 14, 1921, by Elk Basin Company as set out above. The income of the Mutual Oil Company of Maine and its three subsidiaries, determined separately for the period January 1 to March 14, 1920, both inclusive, was calculated to be $196,469.18 and their invested capital was calculated to be $665,132.55, representing an invested capital of $3,192,636.27 at January 1, 1920, apportioned to the first fractional part of 1920.

5. On March 15, 1920, and prior thereto, Mutual Oil Company of Maine, a corporation organized under the laws of the State of Maine, had as subsidiaries and owned all of the outstanding capital stock of Mutual Oil Company of Arizona, Mutual Refining and Producing Company, and Northwestern Oil Refining Company, then engaged in the production, refining, and marketing of petroleum and petroleum products. Elk Basin Company, by the issuance of 600,000 shares of its own stock on March 15, 1920, simultaneously acquired all of the outstanding capital stock of Mutual Oil Company of Maine and all of the outstanding capital stock of each of its three subsidiary corporations.

6. On January 1, 1920, Elk Basin Company also acquired all of the outstanding capital stock of the Grass Creek Petroleum Company (incorporated in 1916 under the laws of the State of Maine) by the issuance of 133,333⅓ shares of its capital stock, and on the same day acquired all of the outstanding capital stock of Keoughan-Hurst Drilling Company (incorporated in 1916 under the laws of the State of Wyoming) by the issuance of 466,666⅔ shares of its capital stock.

The par value of the capital stock of Elk Basin Company was $5.00 per share.

7. During years after 1920 certain material changes occurred in the corporations mentioned above, as follows:

On April 30, 1921, the Northwestern Oil Refining Company and the Mutual Refining and Producing Company each

transferred without consideration all of its property and assets to the Mutual Oil Company of Arizona.

On December 22, 1921, Elk Basin Company changed its name to Mutual Oil Company.

On December 31, 1921, Mutual Oil Company of Arizona transferred without consideration all of its property and assets (including the property and assets of Northwestern Oil Refining Company and Mutual Refining and Producing Company which it acquired as aforesaid) to Mutual Oil Company, known prior to December 22, 1921, as the Elk Basin Consolidated Petroleum Company.

Mutual Oil Company of Maine and Mutual Refining and Producing Company dissolved in 1921. Northwestern Oil Refining Company and Mutual Oil Company of Arizona dissolved in 1922.

Mutual Oil Company (successor to Elk Basin Company, Mutual Oil Company of Arizona, Northwestern Oil Refining Company and Mutual Refining and Producing Company, as aforesaid) changed its name in 1925 to Continental Oil Company of Maine which entered into a written agreement on April 30, 1929, with the Marland Oil Company, a Delaware corporation, transferring all of its assets to the latter in exchange for shares of its capital stock. Marland Oil Company acquired the use of the name Continental Oil Company and duly changed its name accordingly.

8. On April 30, 1929, Continental Oil Company of Maine entered into a written agreement entitled Plan of Reorganization and Agreement with the Marland Oil Company, a Delaware corporation, wherein and whereby the Marland Oil Company acquired the assets of the Continental Oil Company of Maine (formerly known as Elk Basin Company) in exchange for shares of the capital stock, and thereafter, upon consummation of that agreement, acquired the use of the name Continental Oil Company and duly changed its name accordingly. It is the plaintiff in case No. 45730.

The eleventh paragraph of that agreement is as follows:

> *Eleventh.* Marland will pay and discharge any Federal and/or State Income Tax Liability to which Mar-

land and/or Continental may be subject and will assume and pay all other liabilities which may arise or result from the carrying out of this plan of reorganization and agreement.

9. The adjustments made by the Commissioner on the consolidated federal income and excess profits tax return for the calendar year 1920 (mentioned in finding 4 above) resulted in a separation of taxable income and invested capital for the two taxable periods (a) January 1 to March 14, 1920, and (b) March 15 to December 31, 1920, inclusive.

During 1925 the Continental Oil Company of Maine received a so-called 60-day letter proposing to assess a deficiency of $56,113.14, for the period of January 1 to March 14, 1920, inclusive, against it as transferee of the assets of Mutual Oil Company of Maine and its three subsidiaries. An appeal was taken from that letter to the United States Board of Tax Appeals. A decision determining no deficiency was promulgated May 19, 1931, and is reported in 23 B. T. A. 311. The Commissioner appealed therefrom to the Court of Appeals of the District of Columbia which reversed and remanded the decision below. *Helvering* v. *Continental Oil Co.*, 68 F. (2d) 750, November 22, 1933. The United States Supreme Court denied a petition for writ of certiorari, 292 U. S. 627. Upon remand, the Board of Tax Appeals reconsidered the matter and determined deficiencies against the Continental Oil Company, 34 B. T. A. 29. This decision was appealed to the Court of Appeals of the District of Columbia and affirmed. *Continental Oil Co.* v. *Helvering*, 100 F. (2d) 101. A deficiency was thereafter assessed and defendant therein filed a petition in the action in the Supreme Judicial Court in Equity, County of Cumberland, State of Maine, entitled "George F. Smith, Plaintiff, vs. Continental Oil Company, Defendant" (which is the same action mentioned in paragraph First of the petition in case No. 46029) to compel payment of such deficiency. A decision on that petition was entered February 21, 1944, in favor of the United States and the Court entered a decree on April 13, 1944, directing payment on or before May 16, 1944, of the sum of $61,523.34,

with interest at 6% per annum from February 15, 1937, to the date of payment. Payment was made by check on May 16, 1944, in the amount of $88,142.44.

10. On March 9, 1925, a claim for refund of $200,707.45, for the calendar year 1920, on Treasury Department Form 843, was filed with the Collector of Internal Revenue at Denver, Colorado. This claim was executed in the name of Elk Basin Company and set forth as grounds a statement "That the assessments are before the department and that facts have developed which will be presented in connection with appeals from proposed additional tax to show income smaller and invested capital larger than reported, entitling the taxpayer to refund of all or a greater part of the taxes paid." That refund claim was one for an overpayment of tax alleged to have arisen by reason of the exclusion of income and invested capital of the Mutual Oil Company of Maine and its three subsidiaries for the first two and a half months of 1920, as stated above, and claimed that such refund resulted from an understatement of invested capital.

11. Upon an examination of the refund claim filed March 9, 1925, the Commissioner determined an overpayment of tax by the Elk Basin Company in the sum of $12,779.97 and duly issued a certificate of overassessment therefor, together with a check in such amount, plus accrued interest thereon of $4,475.09. That check was rejected and returned by the Continental Oil Company of Maine to the Commissioner, together with the certificate of overassessment. The check and the certificate were subsequently cancelled and the money repaid into the Treasury of the United States. In making that determination, the Commissioner computed a consolidated net income of $1,084,800.52 and a consolidated invested capital as follows:

INVESTED CAPITAL

Capital Stock	$3, 000, 000. 00
Surplus paid in	119, 314. 03
Reserves for income tax	10, 962. 46
Surplus, earned	176, 266. 25
Total	3, 306, 542. 74

Reporter's Statement of the Case

INVESTED CAPITAL—Continued

Additions:		
(a) Acquisition of Grass Creek Petroleum Co	$1,000,000.00	
(b) Acquisition of Keoughan Hurst Drilling Co	2,333,333.33	
(c) Acquisition of Mutual Oil Co. of Maine, and subsidiaries	2,393,442.62	
		$5,726,775.95
Total		9,033,318.69
Reductions:		
(d) Dividend	$137,736.49	
(e) Income tax for 1919	4,626.29	
(f) Deduction for inadmissibles	964,224.17	
		1,106,586.95
Adjusted invested capital		7,926,731.74

12. In reaching the determination upon which the certificate of overassessment was based and in issuing the check for $17,255.06, the Commissioner in computing invested capital declined to take into account and give effect to a claimed fair market value for the capital stock of Elk Basin Company issued in exchange for the capital stock of Keoughan-Hurst Drilling Company, Mutual Oil Company of Maine, Mutual Oil Company of Arizona, Mutual Refining and Producing Company and Northwestern Oil Refining Company, as stated above, but did determine invested capital from the basis of the value for the assets behind such stocks. An application was made to reopen and reconsider the claim for refund. This was granted but action thereon was deferred by mutual agreement pending final decision upon the pending appeal to the Board of Tax Appeals, mentioned above. After the Board proceedings were concluded, the claim for refund was reconsidered and disallowed and rejected in full by the Commissioner on December 13, 1941.

13. The consolidated net income of Elk Basin Company for the calendar year 1920, which is subject to income and profits taxes for that year, is the sum of $1,087,025.43. This sum includes an adjustment for depletion of $38,576.29 in lieu of the amount of $39,942.40 claimed in plaintiffs' petitions.

14. Elk Basin Petroleum Company was organized December 11, 1916, with an authorized capital stock of 400,000 shares. On November 6, 1919, its authorized capital stock was increased to 1,000,000 shares. On January 6, 1920, its name was changed to Elk Basin Consolidated Petroleum Company and its authorized capital stock was increased to 3,000,000 shares, par value $5.00 per share. For some time prior to March 15, 1920, and thereafter, this stock was traded in on the New York Curb Exchange. Quotations appear below. These are all for stock of Elk Basin Petroleum Company and Elk Basin Consolidated Petroleum Company. They were taken from the New York Times and from the Financial & Commerce Chronicle, both being daily newspapers of general public circulation in the City and State of New York and elsewhere.

Week ending	Low	High	Sales for week
October 3, 1919	8⅝	8⅞	600 shares.
10	9⅛	9½	700 shares.
17	8⅝	9¼	1,900 shares.
24	9	9	100 shares.
31	-----	-----	No sales reported.
November 7, 1919	8½	8½	100 shares.
14	8¼	8¾	400 shares.
21	8	8¾	47,800 shares.
28	7¾	8⅞	127,500 shares.
December 5, 1919	7¼	7¾	6,500 shares.
12	7½	8	1,850 shares.
19	-----	-----	No sales reported.
26	8¼	8⅝	1,800 shares.
January 2, 1920	8½	9	8,600 shares.
9	8⅞	9	4,700 shares.
16	8⅝	8⅞	1,500 shares.
23	8½	9⅝	25,100 shares.
30	9¼	9⅝	36,800 shares.
February 6, 1920	8⅝	9⅝	11,500 shares.
13	8	8⅞	11,200 shares.
20	8¼	8¾	20,000 shares.
27	7⅞	8⅝	9,200 shares.
March 5, 1920	7¾	8⅞	13,500 shares.
12	8¾	11¼	45,500 shares.
19	10	10¾	12,700 shares.
26	9½	10¼	10,200 shares.
December 22, 1919	8¼	8½	
23	8½	8⅝	
24	-----	-----	No sales reported.
26	8½	8⅝	
27	-----	-----	No sales reported.
29	8⅝	8⅞	
30	8½	8⅝	
31	8⅝	8¾	
March 10, 1920	9⅞	10	
11	9⅞	10¼	
12	10⅝	11⅛	
13	10⅞	11¼	
14	10⅜	10¾	
15	9	11¼	
16	10	10¾	
17	10	10½	
18	-----	-----	No sales reported.
19	10	10¼	
20	10	10¼	

The Financial & Commercial Chronicle, in its issue of December 27, 1919, showing New York Curb Market quotations for the week December 20 to 26, inclusive, carried on the same page with the quotations of prices for Elk Basin Petroleum Company stock a statement reading:

> New York "curb" Market. Below we give a record of the transactions in the outside security market from Dec. 20 to Dec. 26, both inclusive. It covers the week ending Friday afternoon. On the "Curb" there are no restrictions whatever. Any security may be dealt in and anyone can meet there and make prices and have them included in the lists of those who make it a business to furnish daily records of the transactions. The possibility that fictitious transactions may creep in, or even that dealings in spurious securities may be included, should, hence, always be kept in mind, particularly as regards mining shares. In the circumstances, it is out of the question for anyone to vouch for the absolute trustworthiness of this record of "Curb" transactions, and we give it for what it may be worth.

A similar statement appeared in the issues showing quotations for the weeks ending December 5, 12, and 19, 1919, and for weeks ending March 5 and 12, 1920. No similar statement appeared in any of the issues of the New York Times, which also carried quotations of the Elk Basin Stock.

15. The Elk Basin Petroleum Company filed a federal income and profits tax return for the calendar year 1919 reporting gross profits of $265,489.31, deductions therefrom of $152,272.01, a net taxable income of $113,217.30, an invested capital of $1,980,737.14, and a total federal tax due of $10,962.46.

The Grass Creek Petroleum Company filed a similar tax return for the calendar year 1919 reporting gross profits of $337,134.78, deductions therefrom of $306,700.79, a net taxable income of $30,433.99, an invested capital of $1,212,094.72, and a total federal tax due of $2,843.40. The Commissioner adjusted this return to show a corrected invested capital of $729,558.14 and a corrected net taxable income of $105,595.52, producing a deficiency tax of $15,477.71 which was assessed in February 1921.

The Keoughan-Hurst Drilling Company filed a similar tax return for the calendar year 1919 reporting gross profits of

$83,372.75 from drilling operations only, deductions therefrom of $141,410.08, a net loss of $58,037.33, an invested capital of $1,916,891.84, and no tax due.

The Mutual Oil Company of Maine filed a consolidated federal income and profits tax return for itself and its three affiliated subsidiaries (Mutual Oil Company of Arizona, Mutual Refining and Producing Company and Northwestern Oil Refining Company) for the calendar year 1919 reporting a gross profit of $1,490,247.76, deductions therefrom of $982,302.26, a net taxable income of $507,945.50, an invested capital of $3,023,841.18 and a total tax due of $97,941.43.

16. The Elk Basin Petroleum Company addressed a letter to its stockholders on December 19, 1919, as follows:

> Your Board of Directors has voted, subject to the approval of the stockholders, to increase its capital stock from 1,000,000 shares, of a par value of $5.00 each, a total of $5,000,000, to 3,000,000 shares, of a par value of $5.00 each, a total of $15,000,000; there is now outstanding $3,000,000 of the capital stock of the Company.
>
> The Board has voted to set aside for the acquisition of the capital stock of the Keoughan-Hurst Drilling Company, a Wyoming corporation, $2,333,333 par value of its capital stock; and for the acquisition of the capital stock of the Grass Creek Petroleum Company, a Maine corporation, $666,667 par value of its capital stock. The holders of 75% of the outstanding capital stock of the Keoughan-Hurst Drilling Company, and 60% of the outstanding capital stock of the Grass Creek Petroleum Company have already agreed to accept the above proposition and it is the belief of the undersigned that practically all shareholders of both companies will accept the offer of exchange about to be made, so that all the assets of these two companies will become the Property of the Elk Basin Petroleum Company. With these two transactions completed there will be outstanding $6,000,000 par value of the capital stock of your Company, and $9,000,000 will remain unissued for future corporate needs and the enlargement of the scope of its activities.
>
> The holdings of your Company with the above acquisitions completed will consist of valuable royalties and leasehold interests in the Elk Basin, Grass Creek, Big Muddy and Rock River fields of Wyoming; Ranger and Burkburnett fields of Texas; Homer and Bull Bayou fields of Louisiana; and in the Beggs, Osage and Comanche fields of Oklahoma; also promising prospects in hold-

ings in Texas, Kansas, Louisiana, New Mexico, and Colorado. The Company will have interests in over 130,000 acres.

Net earnings of the 3 companies before depletion, depreciation and taxes are now running at the rate of approximately $1,200,000 per annum. The Company has a large interest in the Rock River Field of Wyoming, which is being operated by the Ohio Oil Company and upon which that Company is now carrying on an extensive drilling programme and large earnings should be realized from this increased production; your Company will have when these transactions are consummated several strings of tools running in proven territory in the Ranger Field in Texas, which it is confidently expected will greatly increase its earnings. The regular quarterly dividend at the rate of 10% per annum on the outstanding $6,000,000 of stock will be paid February 1, 1920.

The Company will be in control by virtue of the above acquisitions of approximately $2,000,000 in cash; also drilling tools and other equipment valued conservatively at $500,000 making over 40% of its capital represented by cash and other liquid assets.

It will be the policy of the Company to extend its development operations in the producing fields of the Mid-Continent, Wyoming, Texas and Louisiana, and it is the belief of your Board of Directors that the Company as thus capitalized will have bright prospects for developing into one of the important factors in the production of oil in the territories mentioned.

The active field management of the Company will be in the hands of Mr. S. H. Keoughan of Denver, Colorado, one of the most successful and economical oil operators in the West.

A copy of this letter appeared on page 2443 of the issue of the Financial and Commercial Chronicle of December 27, 1919.

17. During the autumn of 1919, the firm of C. H. Pforzheimer & Company, brokers and dealers in securities, specializing in the securities of companies engaged in the production, refining, and marketing of petroleum products, with offices at No. 25 Broad Street in New York City, was an active dealer in the stock of Elk Basin Petroleum Company, both in the capacity of brokers and in that of traders.

In October or November 1919, Elk Basin Petroleum Company offered its stockholders the right to subscribe to 200,000

shares of its capital stock (par value $5 per share) at a price of $7.50 per share, making an aggregate total of $1,500,000. The Pforzheimer firm had formed a syndicate to take up at the same price so much of the Elk Basin stock as was not subscribed and paid for by the stockholders. On November 28, 1919, 133,333⅓ shares were sold, 66,151⅔ shares were sold on December 9, and 515 shares were sold on December 19, 1919, aggregating 200,000 shares, at a price of $7.50 per share. Elk Basin Petroleum Company paid a broker's commission thereon of $150,000.

By written agreement dated December 16, 1919, Keoughan-Hurst Drilling Company sold 100,000 shares of its capital stock (par value $5 per share) to the Pforzheimer firm at a price of $8.50 per share. This sale was actually made December 27, 1919, for cash. It was part of a plan whereby Elk Basin Petroleum Company was to acquire all of the outstanding capital stock of Keoughan-Hurst Drilling Company and Grass Creek Petroleum Company by an exchange of stock for stock, also to change its name, the number of its directors, and to secure the election of S. H. Keoughan and J. T. Hurst as such directors.

In another written agreement, also dated December 16, 1919, the Pforzheimer firm contracted to exchange its 100,000 shares of Keoughan-Hurst stock for stock of the Elk Basin Company as part of the same plan mentioned in the paragraph next above whereby the Elk Basin Company was to acquire all of the outstanding Keoughan-Hurst stock (300,000 shares, including the 100,000 mentioned above) in exchange for 466,666 shares of its own stock. C. H. Pforzheimer individually agreed to negotiate the contemplated transactions. It was also agreed, as part of the same plan, that the Elk Basin stock—other than that acquired by the Pforzheimer firm—would be withheld from the market until August 1, 1920. There was no restriction upon the sale of the Elk Basin stock acquired by the Pforzheimer firm. These agreements were carried out.

18. On July 31, 1920, Elk Basin Consolidated Petroleum Company executed and filed its federal capital stock tax return for the year 1921, reporting 1,800,000 shares of capital stock outstanding with a par value of $5.00 per share aggre-

gating $9,000,000, a surplus of $1,193,359.84, a total value of $10,193,359.84 for capital stock tax computation, and a tax thereon of $10,188. Exhibit B to that return reported New York Curb Market quotations for its stock as follows:

Date	Shares outstanding	Price
January 1920	1,200,000	$9.25
February	1,200,000	9.12½
March	1,800,000	8.12½
April	1,800,000	9.50
May	1,800,000	8.25
June	1,800,000	8.00
Average	1,633,333	8.71

Total value, $14,226,330.43.

The Commissioner addressed a letter to the taxpayer on October 3, 1921, proposing an additional tax of $4,033 upon its return, based upon a fair value of $14,226,330 for its capital stock. The Elk Basin Consolidated Petroleum Company replied by letter dated October 26, 1921, under oath, stating in substance that par value ($5 per share) of its stock should be used rather than the quoted Curb market value for its capital stock for the reasons (a) that sometime before July 1, 1920, all production of Keoughan-Hurst Drilling Company (previously something like two thousand barrels of daily production in Texas) had ceased; (b) that this fact had not become generally known to the public, did render the stock of Elk Basin Consolidated Petroleum Company much less valuable, but had not yet affected its market value; (c) that the market price of the Elk Basin stock after consolidation of Elk Basin Petroleum Company with the other corporations had not reflected the effect of the consolidation and was based upon the substantial dividend record of the original small company whose name "Elk Basin" was widely and favorably known; (d) that the market quotations for Elk Basin stock were not a fair criterion of its value since the block of stock exchanged for the securities of the Mutual Oil Company (600,000 shares) had been placed in escrow and remained so and that the block of stock exchanged for the Keoughan-Hurst stock had also been placed in escrow and that the market quotation of the Elk

Basin stock was thus maintained at a higher level than would have been the case had the entire number of shares been subject to sale; and (e) that the market for the Elk Basin stock on the New York Curb was strongly supported by certain New York Curb brokers, who, by furnishing a ready and strong market for this stock, maintained its price at considerably above the value reflected by the books of the corporation. The Commissioner accepted the statements in the letter of October 26, 1921, from the Elk Basin Consolidated Petroleum Company as true and accepted its capital stock tax return and the value therein reported of $5.00 per share as correct.

19. The consolidated invested capital of the Elk Basin Consolidated Petroleum Company for the calendar year 1920, after giving effect to all adjustments, including the acquisitions of stock, on January 1 and March 15, 1920, referred to in findings 5 and 6, was in the amount of $7,926,731.74.

The court decided that the plaintiff, the Continental Oil Company, in No. 45730, was entitled to recover $12,156.99, with interest, and it was ordered that the petition in No. 46029 be dismissed.

LITTLETON, *Judge*, delivered the opinion of the court:

It would serve no useful purpose to recount here the many facts connected with the long history of litigation which has attended this tax case in the Internal Revenue Bureau, the Tax Court, and the other courts prior to the filing of this petition. It is likewise unnecessary to discuss the corporate history of plaintiff and the several related and affiliated corporations. Substantially, the entire issue in the case is a relatively simple one: namely, the actual cash value of certain stock of other corporations paid in for stock of the Elk Basin Company, the predecessor of plaintiff, and unless that issue is determined favorably to plaintiff there can be no recovery.

While separate plaintiffs are involved in the two suits, i. e., Continental Oil Company, a Delaware corporation, No. 45730, and Robinson Verrill, as Successor-Trustee of Continental Oil Company, a Maine corporation, No. 46029, the same cause of action is set up in each petition and the second

suit was filed in order to preserve and protect the rights of the Maine corporation in the event it should be decided that the corporate plaintiff in No. 45730 is precluded by Section 3477 of the Revised Statutes from recovery under the first petition. No such defense, however, is applicable and has not been raised by the defendant. The second petition in No. 46029 will therefore be dismissed.

The Continental Oil Company, plaintiff in No. 45730, is the successor after various corporate changes to the Elk Basin Consolidated Petroleum Company, and for convenience will generally be referred to as the plaintiff without regard to the various changes in corporate name and corporate status.

For some time prior to January 1, 1920, plaintiff had been engaged in the production, refining, and marketing of petroleum and petroleum products, and shortly prior to that date it embarked upon a plan of expanding its holdings and activities. Plaintiff acquired all the outstanding capital stock of two other corporations on January 1, 1920, in exchange for 600,000 shares of its own capital stock. Plaintiff by the issuance of 600,000 shares of its own stock March 15, 1920, acquired all the outstanding capital stock of another company which had three wholly owned subsidiary corporations whose stock was also acquired.

Plaintiff filed a consolidated income and excess profits tax return for the calendar year 1920 on May 14, 1921, and included therein its own income and invested capital, the income and invested capital of the two corporations which were acquired on January 1, 1920, and the income and invested capital of the four corporations which were acquired on March 15, 1920, all the corporations in the group being considered as a part of a consolidated group for the entire calendar year 1920. The return showed a consolidated invested capital of $8,721,214.84, a consolidated net taxable income of $1,167,974.45, and a total tax due thereon of $200,707.45. The tax shown due, together with interest of $201.77, was paid in five installments during 1921.

The Commissioner audited that return and determined that the corporation with three subsidiaries, acquired on March 15, 1920, should be considered as a separate affiliated

group for the period January 1 to March 15, 1920, and accordingly determined a separate assessment against that group for that period. The taxable income of that group for such period was computed in the amount of $196,469.18 and its invested capital in the amount of $665,132.55, such latter amount representing an invested capital at January 1, 1920, of $3,192,636.27, apportioned for the fractional period of 1920 for which a separate return was required. After extended litigation, a deficiency against that group was finally determined which was paid with interest in the total amount of $88,142.44 (finding 9).

In the meantime plaintiff filed a claim for refund on March 9, 1925, for the entire tax of $200,707.45 which it had paid on the consolidated return filed for 1920 on the ground that the income for the consolidated group had been overstated and the invested capital understated. The principal basis of the ground stated in that claim was alleged to have arisen by reason of the exclusion from the plaintiff consolidated group of the corporations acquired by plaintiff March 15, 1920, heretofore referred to, and that with such exclusion there had been an understatement of invested capital. After an examination of that claim, the Commissioner computed a consolidated net income in the amount of $1,084,800.52, and consolidated invested capital of $7,926,731.74. In this computation the Commissioner allowed additions to consolidated invested capital of $3,333,333.33 and $2,393,442.62 on account of the acquisitions of stock of other corporations on January 1 and March 15, 1920, respectively, heretofore referred to.

On the basis of that computation the Commissioner determined an overpayment of $12,779.97 and duly issued a certificate of overassessment therefor together with a check in that amount plus accrued interest thereon of $4,475.09 (findings 10, 11, and 12). Plaintiff refused to accept this check and returned it to the Commissioner, together with the certificate of overassessment. The check and the certificate were subsequently canceled and the money repaid into the Treasury of the United States. In making that determination the Commissioner declined to give effect to the claimed market value of plaintiff's stock which was issued for the stock of the

groups of corporations on January 1 and March 15, 1920, but did determine additions to plaintiff's consolidated invested capital by reason of those acquisitions on the basis of the value of the assets behind such stock which he determined represented the actual cash value of such stock. On application of plaintiff the claim for refund was later reconsidered by the Commissioner after plaintiff had rejected the determined overpayment and check, but on such reconsideration the claim was rejected in full December 13, 1941.

The position which plaintiff takes in this suit is that in determining its consolidated invested capital for 1920, the stock of the group of corporations acquired on January 1, 1920, and the stock of the group acquired on March 15, 1920, represented tangible property paid in for stock of plaintiff on those dates and by according to such stock its proper value invested capital will be substantially increased over that determined by the Commissioner and the refund sought through this suit will result. Section 326 (a) (2) of the revenue act of 1918 contains the following provision with respect to the inclusion in invested capital of tangible property paid in for stock:

> Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus; * * *.

The governing statute, section 325 (a) of the Revenue Act of 1918, includes in the definition of "tangible property" stocks, bonds, and other evidences of indebtedness and this court has held that where a corporation issues its stock for the stock of another corporation, the stock so acquired is to be considered as tangible property paid in for stock. *United Cigar Stores* v. *United States*, 62 C. Cls. 134, certiorari denied 275 U. S. 576.

On January 1, 1920, plaintiff issued 600,000 shares of its stock for the stock of two corporations and on March 15, 1920, it also issued 600,000 shares of its stock for the stock of certain other corporations and the controversy relates to determination of the actual cash value of that tangible property (stock) paid in for plaintiff's stock on those dates. In the certificate of overassessment and check for the overpayment above referred to which were rejected by plaintiff and later canceled by the Commissioner, the Commissioner declined to take into account and give effect, for invested capital purposes, to a fair market value claimed by plaintiff for the capital stock of these corporations but he did determine invested capital on account of the acquisition of these stocks on what he determined to be the actual cash value on the basis of the value of the assets behind such stock. On that basis the Commissioner allowed, as above stated, an addition to invested capital on account of the first acquisition of $3,333,333.33, and on account of the second acquisition of $2,393,442.62, whereas plaintiff contended then and now contends that the actual cash value of the stock paid in in the first acquisition was $4,499,995, and in the second acquisition $6,075,000. The second acquisition was in the consolidated group for only a part of the year, that is, from March 15, 1920, and when appropriate adjustment is made therefor the addition to invested capital on account of that acquisition, as claimed by plaintiff, amounts to $4,846,721.31. The total additions to invested capital on account of the two acquisitions as determined by the Commissioner amounted to $5,726,-775.95, whereas the total claimed by plaintiff amounts to $9,346,716.31.

Little, if any, evidence was presented as to the cash value of the stocks paid in, that is, such as what their past history of earnings was, what assets were back of this stock, or what the prevailing market prices were for these stocks. Plaintiff presents and relies almost exclusively on the curb market prices for its own stock which prevailed on or about the basic dates in question, which it contends, as it had contended before the Commissioner, show an actual cash value of its own stock on January 1, 1920, of approximately $7.50 per share,

and on March 15, 1920, of $10⅛ per share. It says that therefore the actual cash values of the stock paid in for its stock are to be measured by these market prices for its own stock. If we assume without deciding that the cash value of plaintiff's stock is a proper basis of valuing the stock paid in, we are nevertheless unable to agree that, in the circumstances which prevailed in this case, the curb market prices alone are sufficient to substantiate and justify the allowance of a cash value based on those prevailing prices. It is of course true that in many cases prevailing market prices are an acceptable basis for determining value. However, we are here concerned with oil stocks which not only are ordinarily of a highly speculative nature but also the corporations were at that time being brought together in a new operation. We do not therefore have either a past history of sales of stock or a past history of operations as guides in considering these stocks. That they were highly speculative is shown by the fact that within a short time after the basic dates in question many of the bright pictures painted by the brokers who were selling the new stock of plaintiff had been found unwarranted. The market which prevailed was strongly supported by certain New York curb brokers who were dealing in this stock and in addition there was a restrictive agreement in effect which prevented a large block of the stock from being offered for sale during the period we are asked to value the stock.

No more persuasive argument against acceptance of these curb market prices as a basis of valuation need be offered than that presented by the plaintiff when the Commissioner sought to use these and similar prices to fix a fair value for this stock for capital stock tax purposes on July 1, 1920. The plaintiff had used a par value of $5 per share, whereas the Commissioner sought to increase that value by the use of the prevailing curb market prices. Plaintiff submitted arguments in opposition to such an increase similar to the considerations we have set out above as showing the unreliability of such market quotations in the peculiar circumstances of this case. The Commissioner receded from his position after the receipt of those arguments and allowed the valuation of $5 a share

to stand as shown in the original capital stock tax return. That valuation was, of course, for a somewhat later date, July 1, 1920, and for a different purpose, but the arguments advanced by plaintiff covered the period with which we are here concerned and also some of the market prices with which we are dealing. We do not say that as a result of what occurred at that time plaintiff is estopped to take a different position in this proceeding which concerns an entirely different determination, but we are convinced that the arguments there advanced against relying on these curb market stock quotations as a guide for valuing the stock are sound.

Whether the term "actual cash value," as used in the governing statute, is something different from the term "fair market value," it is not necessary to decide. We think, however, that it emphasizes the fact that in determining invested capital all speculative or inflationary values are to be eliminated and an actual sound value of the property paid in must be established. Cf. *La Belle Iron Works* v. *United States*, 55 C. Cls. 462, affirmed 256 U. S. 377. Merely because some of this stock was being bought and sold on the Curb Exchange in a broker-supported market is not sufficient evidence to convince us that the actual cash value of tangible property paid in for that stock can be fully and satisfactorily measured by such prices.

We are, however, convinced from the record that plaintiff is entitled to some increase in its invested capital for 1920 on account of these stock acquisitions over that allowed by the Commissioner when he rejected the claim for refund in full on December 13, 1941. Prior to that time and after the invested capital and income of the second group had been excluded from the consolidated return, the Commissioner reaudited the return in connection with the claim for refund and determined and allowed additions to invested capital on account of the two acquisitions in the respective amounts of $3,333,333.33 and $2,393,442.62. While the certificate of overassessment and the refund check for a total of $17,255.06, based on that determination were rejected by plaintiff and later canceled by the Commissioner, we are convinced that the amounts and values determined and allowed at that time

represented reasonable additions to invested capital on account of the actual value of property paid in at the times in question. The fact that they are based on the valuation of the assets back of the stock, rather than an attempt to value the stock itself, does not mitigate against their use as evidence in determining value; that was the best evidence available. In that determination the Commissioner computed an adjusted invested capital of $7,926,731.74 which we likewise are satisfied was fair and reasonable, and have so found as a fact. The parties have stipulated that the consolidated net income of plaintiff for the calendar year 1920 is the sum of $1,087,025.43. On the basis of that net income and the invested capital as above-mentioned, the correct tax liability for 1920 is $188,550.46. The difference between that amount and the tax which has been paid, $200,707.45, is $12,156.99, which constitutes an overpayment.

It accordingly follows that plaintiff, Continental Oil Company, is entitled to recover an overpayment in the amount of $12,156.99, plus interest at 6% per annum from December 16, 1921, the date of payment, to a date not later than 30 days preceding the issuance of the refund check which plaintiff rejected, which interest was a part of the interest of $4,475.09 heretofore tendered by the Commissioner in that refund check. Since the amount of this overpayment and the amount of interest due thereon were tendered to plaintiff, it is not entitled to any additional interest under section 177 (b) of the Judicial Code as amended by sec. 614 (a) (2) of the Revenue Act of 1928.

Judgment is entered in favor of plaintiff, Continental Oil Company, for $12,156.99 with interest computed as above stated.

The petition as to Robinson Verrill, etc., No. 46029, is dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.

Syllabus

GREAT LAKES DREDGE & DOCK COMPANY v. THE UNITED STATES

[No. 45623. Decided October 1, 1945; January 7, 1946]*

On the Proofs

Government contract; deductions made by defendant for overdepth dredging.—Where plaintiff, under a contract for certain dredging work in Cape Cod Canal and in Hog Island Channel in Buzzards Bay, Massachusetts, was required to dredge the channel into Onset Bay to a depth of 17 feet over a bottom width of 100 feet and to dredge a channel in the Cape Cod Canal to a depth of 32 feet over a bottom width of 315 feet; and where, under the contract, to cover inaccuracies in the dredging process, an excess depth of 3 feet was allowed, for which payment was to be made; and where after the work had been completed it was ascertained, as a result of soundings and sweepings that 443,393 cubic yards had been removed beyond the allowable depths and side-slopes; it is *held* that the deductions made for excessive overdepth dredging in the settlement made with plaintiff were properly made and plaintiff is not entitled to recover.

Same; the excessive dredging resulted from plaintiff's operations.—Where the contractor deliberately dredged to the maximum allowable depth of 35 feet in the Cape Cod Canal, although put on notice by the specifications that experience under recent contracts had shown that about 25 percent of the material required to be taken out had been removed by erosion; and where, although the defendant did not desire a depth of more than 32 feet, defendant nevertheless paid for all material removed to the 35-foot level; it is *held* that plaintiff is not entitled to recover for more, since it is shown that the deductions for excessive dredging resulted from plaintiff's abuse of the overdepth dredging privilege provided for in the contract.

Same; plaintiff not entitled to recover on account of failure of contracting officer to prescribe overcuts.—Where specifications provided that contracting officer would prescribe overcuts and none were prescribed, plaintiff is not entitled to recover for removal of earth that had slid down into the bottom from sides, where contractor consistently and intentionally dredged to limit of overdepths and to the extreme of the side-slope.

Same; basis of deductions; the deductions were based on surveys made pursuant to the terms of the contract.—It is found that all deductions made were for material actually removed by plaintiff, as shown by scow measurements; that the deductions were in general based on final surveys made in accordance with the

*Plaintiff's petition for writ of certiorari pending.

provisions of the contract and specifications; and that they were promptly made after completion of a section.

Same; intermediate surveys.—Intermediate surveys provided for in the specifications were made as promptly after dredging as existing dredging conditions warranted.

The Reporter's statement of the case:

Mr. William S. Hammers for the plaintiff.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

ON PLAINTIFF'S MOTION FOR A NEW TRIAL

Plaintiff's motion for a new trial is overruled, and the court on its own motion withdraws the former findings of fact, conclusion of law and opinion rendered on October 1, 1945, and the following findings of fact, conclusion of law and opinion are substituted therefor.

SPECIAL FINDINGS OF FACT

1. Plaintiff is now, and at all times material herein was, a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business at 122 South Michigan Avenue, Chicago, Illinois.

2. On June 6, 1936, plaintiff entered into a contract with the War Department, through the District Engineer, United States Engineer Office, Boston, Massachusetts, for performing certain dredging work in Cape Cod Canal, and in Hog Island Channel in Buzzards Bay, Massachusetts, including the dredging of a channel leading into Onset Bay, and the complete removal and disposal of piers of Old Buzzards Bay Railroad Bridge and the Old Bourne Highway Bridge. The work was described as Section B. The estimated yardage to be removed above the required depth was 4,135,700 cubic yards, and the maximum amount of allowable overdepth dredging was estimated at 807,200 cubic yards. The contract price for the removal of the common excavation was 34.25¢ per cubic yard, scow measurement.

3. Notice to proceed was received by plaintiff on June 29, 1936. Work was commenced by the plaintiff on July 1, 1936, and completed on August 16, 1938.

4. The specifications relating to the work to be done are:

PAR. 1–02. WORK TO BE DONE: * * * The work to be done under these specifications consists of furnishing all plant, labor, and supplies, and the dredging and satisfactory disposal of all material encountered (see par. 4–01), except ledge rock, above the plane of 25 feet below mean low water from Station 37+00 to Station 70+00 and above the plane of 32 feet below mean low water from Station 70+00 to Station 490+00, Cape Cod Canal, Massachusetts, and above the plane of 17 feet below mean low water in the channel leading into Onset Bay. The work will also include the complete removal and disposal of bridge piers, * * *.

The work to be done is shown on the maps and drawings described in paragraph 1–03. For contract purposes the work is divided into two sections, designated as Section "A" and Section "B".

* * * * *

PAR. 1–03. MAPS: The work shall conform to maps marked "Cape Cod Canal, Massachusetts, Dredging Sta. 37+00 to 490+00, in 2 sheets, File No. 460/1–2 E–9–4"; "Cape Cod Canal, Massachusetts, Dredging Sta. 37–490, Onset Channel, in 2 sheets, File No. 465/1–2 E–9–4"; "Cape Cod Canal, Massachusetts, Dredging Sta. 37+00 to 490+00, Hog Island Channel, in 2 sheets, File No. 463/1–2 E–9–4"; and to drawings marked, "Cape Cod Canal, Massachusetts, Dredging Sta. 37+00 to 490+00, Cross Sections, in 25 sheets, File No. 461/1–25 E–9–4"; "Cape Cod Canal, Massachusetts, Dredging Sta. 37 to 490, Pier Removal, in one sheet, File No. 462 E–9–4"; and "Cape Cod Canal, Massachusetts, Dredging Sta. 37+00 to 490+00, Onset Channel Cross Sections, in 1 sheet, File No. 464 E–9–4" which form a part of the specifications, and which are filed in the United States Engineer Office at Boston, Mass., and the U. S. Engineer Sub-Office, Buzzards Bay, Mass.

The plans showed permissible side slopes of one foot vertical to 2½ feet horizontal. Material removed up to these side slopes was to be paid for.

5. The specifications relating to payments and to deductions to be made for excess dredging are:

1–07. *Payments:* * * * (g) So long as funds are available payments will be made monthly on estimates of such material as has been excavated and deposited in accordance with the specifications and not included in any prior estimate. * * *.

1–08. *Physical Data:* * * * Owing to the rapid currents the material in the dredged cuts is eroded when it is disturbed by the process of dredging. During the progress of recent contracts the prescribed cuts have been secured by the contractor after the removal of about 75 percent of the estimated quantity of material in the cut, scow measurement, including overdepth. The quantities of materials given in the specifications, are the estimated pay yardages and are 75 percent of the estimated quantities, scow measurement, that must be removed from the cuts.

2–01. *Order of Work:* * * * The location and limits of the work to be done will be plainly indicated by the contracting officer or his agents by stakes and ranges or otherwise, and gages will be established to show the stage of water with reference to the datum plane for dredging. * * *

4–03. *Overdepth and Side Slopes.* To cover inaccuracies of the dredging process, material actually removed within the specific areas to be dredged to a depth of not more than 3 feet below the required depth will be estimated and paid for at full contract price.

The contracting officer will prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut, and material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for. Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive overdepth dredging or excessive side-slope dredging* and will not be paid for.

4–04. *Method of Measurement:* The material removed will be measured by the cubic yard in scows at the dredge by inspectors appointed by the contracting officer, but the contractor will be held responsible for its satisfactory disposal, and proper deductions will be made for all material that is not deposited according to the specifications. * * *

Whether or not contract depth is being made will be determined by soundings or sweepings taken behind the dredge as the work progresses, and the contractor will be advised of the results. Should this survey disclose any excess of overdepth or side-slope dredging, the amount of such excess will be deducted from the monthly estimates.

4–05. *Equivalent Measurements:* When necessary for any cause to convert "scow measurement" into "place

measurement," or the reverse, 115 yards of the former will be taken as the equivalent of 100 yards of the latter.

4–07. *Final Examination and Acceptance:* As soon as possible after the completion of such sections established in paragraph 1–02 or subdivision thereof as in the opinion of the contracting officer will not be subject to injury by further operations under the contract, such area will be examined thoroughly by sounding and by sweeping, as deemed advisable by the contracting officer. Should any shoals, lumps, or other lack of contract depth be disclosed by this examination, the contractor will be required to remove them by dragging the bottom or by dredging, at the contract rate for dredging; but if the bottom is soft and the shoal areas are small and form no material obstruction to navigation, the removal of such shoal may be waived, in the discretion of the contracting officer. * * * When such sections established in paragraph 1–02 or subdivision thereof are found to be in a satisfactory condition, the work therein will be accepted finally. * * *

Final acceptance will be subject to proper deductions or correction of deductions already made on account of excessive overdepth or excessive side-slope dredging (par. 4–03), and any such deductions or correction of deductions will be included in the next monthly estimates. Final acceptance of the whole or a part of the work and the deductions or corrections of deductions made thereon will not be reopened, after having once been made, except on evidence of collusion, fraud, or obvious error, and the acceptance of a completed section shall not change the time of payment of the retained percentages of the whole or any part of the work stated in paragraph 1–07.

6. On April 8, 1937, plaintiff in a letter to the contracting officer requested information on a deduction of 74,353 cubic yards of excess overdepth dredging made on payment voucher No. 10, and that it be furnished soundings on which the deduction was computed. By letter of April 14, 1937, the contracting officer advised plaintiff that this deduction covered the final overdepth and side-slope deductions in the Hog Island Channel between stations 444 and 490. He stated that under Par. 4–07 of the specifications that section of the work, as well as the Onset Channel work, was thereby finally accepted, and that no future work would be required in that area.

7. On June 8, 1937, plaintiff in a letter to the contracting officer returning the 12th payment voucher covering dredging during the period April 27 to May 26, 1937 requested information concerning an additional deduction of 72,974 cubic yards. Thereafter, the information requested was furnished.

8. On June 21, 1937, plaintiff by letter to the contracting officer made reference to its previous letters concerning deductions for excess overdepth dredging, and advised that it was preparing data in order to submit a claim for payment of the deductions made on estimates Nos. 10 and 12, and for another deduction which had been previously made on estimate No. 2.

9. On July 3, 1937, plaintiff in a letter to the contracting officer complained about deductions made up to that time which aggregated 205,404 cubic yards, 112,142 cubic yards of which covered excess side-slope dredging, and 93,262 cubic yards of excess overdepth dredging. In this letter plaintiff stated:

> In view of the wording of Paragraph 4–03 of the specifications entitled "Overdepth and Side-slopes," we are unable to understand the reason for the above deductions.
>
> In regard to side-slopes this paragraph reads as follows: * * *
>
> During all our contract operations in the Cape Cod Canal, including our present contract, the contracting officer has always set the limit lines and placed the ranges thereon, and we have dredged to these lines. On the present contract, at the start of the straightaway work at Station 485, on September 21, 1936, the limit range was set five feet inside the contract limit line. On or about November 15th, 1936, the limit ranges were moved to seven and one-half feet inside the contract limit line, and no dredging has been done beyond these lines.
>
> Inasmuch as the limit lines to which we are to dredge are established by the contracting officer, and as his representatives actually set these ranges in the field, we are entitled to payment for all material removed in connection with side slopes, whether dredged in original position or after having fallen into the cut, as stated in the specifications.

On October 14, 1937, the contracting officer replied to plaintiff's letters of April 8, June 8, June 21, and July 3, 1937, as follows:

> With regard to your protest against the side-slope deductions, you refer to paragraph 4–03 of the specifications, which reads as follows: * * *
>
> The purpose of this paragraph of the specifications is to enable the contracting officer to secure the project widths and depths of channel described in paragraph 1–02 of the specifications and depicted on the contract drawings by prescribing such overcuts as he may deem necessary to prevent encroachments of material from the sides of the dredged cut. Prescribing of overcuts under this paragraph by the contracting officer is not mandatory, and is left to the judgment of the contracting officer.
>
> The plans as issued, accepted by you in your bid and made a part of your contract, prescribe side slopes of 1 vertical to 2½ horizontal extended from the project depths. At no time has the contracting officer changed the side slopes shown on the contract drawings either as to slope or origin with respect to project depth, nor has he prescribed any overcut since the conditions did not warrant action under paragraph 4–03 of the specifications.
>
> To facilitate dredging in the Cape Cod Canal under your contract, on September 21, 1936, working ranges were set inside the contract limit lines. These ranges were first set five feet inside the contract limit lines, and on November 15, 1936, were moved to seven and one-half feet inside the contract limit lines.
>
> You will note that in establishing these ranges the contract limit lines were in no way changed; neither were overcuts prescribed. The allowable overdepths remained unchanged, as did the side slopes depicted on the contract drawings.
>
> The placing of the ranges on September 21, 1936, five feet inside the contract limit lines was based on the extension of the side slopes shown on the drawings in a downward direction until they intersected what was presumed would be the plane of your average depth (2 feet) of dredging below project depth.
>
> The location of the working range 5 feet inside of the contract limit line, on the assumption of a probable average overdepth of 2 feet, did not abrogate the allowable overdepth of 3 feet prescribed in the specifications, and your estimates have been computed and paid on the basis of full allowable overdepth.

When it became apparent that you were dredging to obtain full allowable overdepth, it was deemed that your operations would best be facilitated by resetting the working range. This was done on November 15, 1936, by moving the range to a line 7½ feet inside the contract limit lines. As the basis for the revised position of the working range, the side slope shown on the drawings was projected downward until it intersected the plane of full allowable overdepth.

A recheck of the quantities deducted for excess side slope dredging discloses that through error the deductions in Estimate No. 2 for work performed on the Onset Channel was based on side slopes of 1 on 2½ at the plane of allowable overdepth (−20 below mean low water) instead of side slopes of 1 on 2½ at the plane of project depth (−17 below mean low water) as prescribed in the contract drawings. Accordingly, further deduction for approximately 22,000 cubic yards at the contract unit price will be made on your next estimate for dredging quantities erroneously included in computing the payments due you for work performed on the Onset Channel. The above quantity is approximate and is subject to final check before the deduction is made. I shall be glad to give you access to the records and survey data upon which this further deduction is based in order that you may check the accuracy of the computations.

With reference to statement contained in your letter of July 3, 1937: "that there is no specific limitation in the specifications as to the precise limits of side-slope payment nor is there mention made that this slope shall be computed from the contract grade line of 32 feet below M. L. W.," you are advised that the drawings which form a part of the specifications and your contract clearly depict the precise limits of side-slope payment. You are, therefore, not entitled to payments for side slope as dredged as claimed. You are further advised that the side-slope deductions which you protest are in accordance with your contract and your claim that any deductions so far made for excess side-slope dredging should be voided and the amount of money deducted should be reinstated in a future estimate is denied.

You are advised of your right to appeal from this decision as provided in Article 15 of your contract.

A review of your letters protesting overdepth deductions discloses that you have established no basis for your claim asserted in your letter of July 3, 1937: "that the excess overdepth dredging deduction should be voided and the amount of money should be reinstated in

a future estimate." It appears that your claim is summarized in your letter of July 3, 1937, in the statement that due to certain "abnormal physical conditions at the Canal some tolerance should be allowed the contractor." It is the opinion of this office that any tolerance beyond that prescribed in the specifications and contract plans, namely, 3 feet of overdepth and side slopes of one on two and a half above the plane of project depth would not be proper or within the scope of the contract. Since the contract tolerances have clearly governed dredging operations under your contract and the payments made therefor, you are advised that your request that deductions so far made for excess overdepth dredging should be voided and the amount of money deducted should be reinstated in a future estimate is denied.

10. By letter of November 19, 1937, plaintiff appealed to the Chief of Engineers, United States Army, who was the duly authorized representative of the head of the department. The grounds of appeal and questions as passed upon are set forth in the ruling of the Chief of Engineers, dated February 11, 1938, as follows:

* * * * *

In support of your claim for reinstatement of 205,404 cubic yards of material at the contract price of $0.3425 per cubic yard, scow measurement, you contend substantially as follows:

(a) That, inasmuch as the contracting officer established lines defining the limits of dredging on the sides of the channel, and placed the side-line markers, you are entitled to payment for all material removed in connection with side-slope dredging.

(b) That the removal of material beyond the side slope limits is attributable to the erosive action of strong currents and waves created by the passage of large vessels. You contend that the alleged scouring action takes place between the time of dredging when the scows are measured for the estimates of yardage, and the time of the final soundings. You further state that such soundings are too long delayed.

(c) That because of the presence of large boulders, embedded in the bottom, it is necessary, in their removal, to do considerable overdepth dredging.

(d) That, since dredging has not been carried out to the limits of the authorized project, the excess removal of material will inure to the benefit of the United States.

Paragraph 4–03, relating to overdepth and side slopes, provides as follows:

"To cover inaccuracies of the dredging process, material actually removed within the specific areas to be dredged to a depth of not more than 3 feet below the required depth will be estimated and paid for at full contract price.

"The contracting officer will prescribe the overcuts to be made to prevent encroachment of material from the sides of the dredged cut, and material actually removed on his order, from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for. Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as excessive overdepth dredging or excessive side slope dredging and will not be paid for."

Paragraph 4–07 of the specifications, relating to final examination and acceptance, provides in part:

"As soon as possible after the completion of such sections established in paragraph 1–02 or subdivision thereof as in the opinion of the contracting officer will not be subject to injury by further operations under the contract, such area will be examined thoroughly by sounding and by sweeping, as deemed advisable by the contracting officer. * * * Final acceptance will be subject to proper deductions or correction of deductions already made on account of excessive overdepth or excessive side-slope dredging (par. 4–03), and any such deductions or correction of deductions will be included in the next monthly estimates. * * *"

The questions at issue are—

(a) Should deduction be made from scow measurement quantities for the material that the surveys provided for in paragraph 4–07 of the specifications disclose has been removed, either by the contractor or by scouring, from outside the slope lines indicated on the contract drawings?

(b) Should deductions be made from scow measurement quantities for material removed, either by dredging or by scour, from below the 3-foot over-depth limit fixed in the specifications?

With reference to (a) above, the facts are that in the Onset Channel, where the contract width is 100 feet, the side ranges were set so as to mark the margins of this 100-foot width. In the main canal, with a view to aiding you in restricting your operations to within the limits of the side slopes shown on the contract drawings, the

side ranges in the early part of the work were set 5 feet channelward of the outer margin at project depth, this location being selected on the assumption that dredging below project depth would be about 2 feet. Later on, or about November 15, 1936, when it was fairly well established that the dredging would be carried to the full 3-foot allowance, the side ranges were set 7½ feet from the side line at the 32-foot depth.

In determining pay quantities dredged in the Onset Channel, credit has been allowed for materials removed on the side slopes from above a line 3 feet vertically below the side slope lines indicated on the contract drawings. In the main canal no such overdepth on the side slopes has been allowed, deduction having been made for quantities removed from outside the side slopes indicated on the contract drawings.

You contend in effect that the contracting officer is required by paragraph 4–03 of the specifications to prescribe overcuts that are to be made to prevent encroachment of material from the sides of the dredged cut and that this prescription relieves the contractor from any responsibility as to the behavior of such side slopes, and that, therefore, there should be no deductions for excessive side slope dredging. In the present case the contracting officer was not of the opinion that such a prescription was necessary in order to control the behavior of the side slopes and he did not prescribe specific overcuts. The only action taken by him in this connection was to establish ranges which if used as guides would apparently best enable you to conduct your dredging operations in order to provide the side slopes indicated on the contract drawings. The fact that no overcuts were prescribed appears to be prima facie evidence that it was not intended that payment would be made for such material as the surveys showed was removed from beyond the side slope lines indicated on the drawings. In fact, the ranges provided by the contracting officer, under the provisions of paragraph 2–01 of the specifications, to define the location and limits of the work to be done were intentionally placed to mark the line of intersection of the bottom overdepth plane and the side slope plane in the main canal and the intersection of the bottom and side slope overdepth planes in the Onset Channel. Your representatives on the work were fully aware of this situation. There certainly was no assumption by the United States of responsibility that the contractor's operations would be limited to the lines so set. Under

these circumstances, I find no basis in the contract provisions in support of your appeal from the decision of the contracting officer with respect to side slope overdepth dredging and must conclude that computations of these non-pay quantities have been prepared on the correct interpretation of the specifications.

With respect to question (b), there appears to be no basis on which it may be urged that payment should be made for material removed from below the bottom 3-foot overdepth plane. Paragraph 4–03 of the specifications is clear in providing that material removed to a depth of not more than 3 feet below the required depth will be estimated and paid for at full contract price. It may not be contended that this 3-foot overdepth may be indefinitely extended to include additional material intentionally or inadvertently dredged. I find that your appeal in this respect is without merit, and it is denied.

It must be recognized that the time at which surveys following dredging are made has an important influence on the extent of shoaling or overdepth dredging disclosed. You contend that such surveys were unduly delayed and refer specifically, as an instance, to the section between Stations 395 and 405. The record for this particular section indicates that the original dredging was completed January 5, 1937; the first redredging was completed February 19, 1937; a second redredging to remove two small shoals was completed April 29, 1937; and three additional small shoals were removed May 20, 1937. Soundings over this section were made January 6, January 20, February 2, February 9, and April 13 and 14, 1937; and these were followed respectively by sweep surveys on January 6, February 2, March 11 and 12, April 30, and May 20, 1937. The record further indicates that had the soundings of January 6 been used, deductions for excessive overdepth dredging would have amounted to about 3,000 cubic yards more than those computed from the sounding of April 13. It should be noted that the specifications do not provide for the acceptance of particular sections prior to completion of the entire contract work. However, it appears that the contracting officer has in fact accepted portions of the work that have been satisfactorily dredged to contract dimensions and has not thereafter held the contractor responsible for changes in conditions within these accepted portions. This, of course, operates to the advantage of the contractor. I conclude that surveys and sweeping operations have been conducted reasonably

promptly after dredging and that there is no evidence indicating that your interests have been adversely affected by the schedule followed.

11. On December 22, 1938, about four months subsequent to completion of the contract, plaintiff renewed its protest to the contracting officer, claiming payment for all overdepth yardage deducted, summarizing its protest as follows:

> To sum up, we contend that the contract required the Contracting Officer to set points for overcut ranges, that the points set were believed to be set for that purpose, and that we were justified in so believing; that the formula used in deduction from the scow measurement gave deductions that were too great, and that no overdepth deductions from scow yardage should be made unless it is clear that the material removed in making the overdepth was placed in the scows and was measured for payment.

12. Under date of January 26, 1939, the contracting officer ruled on plaintiff's protest and denied plaintiff's claim.

On February 16, 1939, plaintiff appealed to the Chief of Engineers from the decision of the contracting officer.

On June 5, 1939, the Chief of Engineers denied plaintiff's appeal.

13. By letters dated July 24 and 25, 1939, to the Chief of Engineers, plaintiff reiterated the contentions made in its previous appeals, and requested reconsideration of decisions thereon. The Chief of Engineers responded by letter of September 28, 1939, stating that a conference had been arranged at the Office of the District Engineer, Boston, Massachusetts, for October 10, 1939. By letter of November 24, 1939, the Chief of Engineers wrote to plaintiff as follows:

> Reference is made to your letter of July 25 with accompanying brief dated July 24, setting forth your views regarding your pending claim against the United States under Contract No. W–175–eng–395 Cape Cod Canal, and to the conference on the subject matter between the representatives of this office and of your organization, held in Boston on October 10, 1939. In your letter and at the conference you requested further consideration of previous conclusions of this office emphasizing your contention that this office has erroneously interpreted the application of paragraph 4–03 of the specifications.

This contention, repeated at various times during the conference, was stated at one time in the following words: "I stand on the claim that this paragraph 4–03 is mandatory, and insist that the contractor dredged to the stakes placed by the contracting officer, and that we haven't the slightest responsibility for a yard of what happens thereafter. * * * I do not think there should be a deduction of a single yard of the side slopes." In support of this contention, you quote a paragraph from Finance Circular No. 144 dated August 6, 1937, issued by this office to its field representatives, as follows:

"3. When subparagraph (a) is used, the United States assumes all responsibility for the side slopes, and deductions are made only if the contractor dredges outside of the limits prescribed by the contracting officer. This is the fairest procedure, and is undoubtedly to the advantage of the United States in the long run, if the material removed can be properly measured. It can be measured when paid for by scow measurement. The standard specifications provide therefore that subparagraph (a) shall be used when the material is measured in scows."

It should be noted that the above circular was issued several months after work under your contract had been commenced and forms no part of the contract. It was issued to indicate to the field offices the policy expected to be followed in interpreting specifications, following the form of the standard dredging specifications, containing a paragraph similar to paragraph 4–03 of your contract. From the wording of the circular, it is evident that this policy could only be applied to such specifications in which no side slopes were specifically designated. It would not be applicable, therefore, to your contract, in which a side slope of one on two-and-one-half is indicated in the plan.

Paragraph 4–03 of the specifications is quoted as follows: * * *

Considering the language in paragraph 4–03 in relation to other paragraphs of the specifications, particularly paragraphs 2–01, 4–04, and 4–07, your contention that paragraph 4–03 is mandatory and that you have no responsibility for any material removed beyond the limits established is not sustained. Paragraph 2–01 states that the contracting officer or his agents will set the stakes or ranges indicating the location and limits of the work to be done. This was done in the present contract, and the location of the limit line, with reference to the stakes, was understood by all concerned. There is noth-

ing in the language of paragraph 4–03 or any other paragraph of the specifications to reveal that the stakes themselves are to be considered more than ranges to indicate the limit of the cut, or that the contractor is relieved from any responsibility for exceeding such limits. Since a side slope has been indicated on the plans for this contract, no other side slope could be permitted or considered under the terms of the contract without written modification in the form of a change order given by the contracting officer. Since the limits of the cut were not extended under authority of paragraph 4–03, or otherwise, the dredging limits remained those established in the plans.

It is to be conceded that in making a cut, the actual depth or area reached with the dredge will depend upon the nature of the materials and the effect of the scour. Paragraph 1–08 of the specifications put you on notice that during the progress of recent contracts the prescribed cuts have been secured by the contractor after the removal of about seventy-five percent of the estimated quantity of material in the cut. With this effect in mind, it cannot be conceded that you had any authority to actually reach the limits of the specified cut with every stroke of your dredging tool. On the other hand, where the limits of the cut have been exceeded, the methods of determining deductions are fully described in paragraphs 4–04 and 4–07 in the specifications.

I must conclude that under the terms of the contract, it was your responsibility to so conduct your dredging operations that the resulting cut would be that called for in the plans.

In view of the above, previous conclusions of this office to the effect that deductions have been properly made are reaffirmed, and I find that no further payments can be made under the terms of the contract.

14. By letter of February 14, 1940, plaintiff advised the contracting officer as follows:

Reference is made to your letter of February 6, requesting the return of signed voucher forwarded from your office on August 8, 1939, as final payment under Contract W175–eng–395, for dredging the Cape Cod Canal, Massachusetts.

We do not, of course, agree with the findings of the Chief of Engineers, as set out in his letter of November 24, 1939, and, having availed ourselves of all the administrative procedure provided for, we have handed this

matter to our attorneys, with instructions to pursue such other recourse as may be had.

Upon the advice of counsel, we have declined, and continue to decline to accept the final payment as provided for in your voucher of August 8, 1939.

15. By letter of June 28, 1940, plaintiff submitted a claim for payment of 443,393 cubic yards of material at the contract rate of 34.25¢ per cubic yard amounting to $151,862.10. In this letter plaintiff set forth substantially the same contentions made in its previous letters to the contracting officer and to the Chief of Engineers hereinbefore referred to. This claim was transmitted by the Chief of Engineers to the Comptroller General who, by certificate of settlement dated June 16, 1941, disallowed it.

16. The contracting officer deducted from payments to plaintiff a total of 258,005 cubic yards of excessive side-slope dredging, and 185,388 cubic yards of excessive overdepth dredging, or a total of 443,393 cubic yards, at the contract rate of 34.25¢ per cubic yard. Of this quantity 28,527 cubic yards of excessive overslope and 29,550 cubic yards of excessive side-slope dredging, or 58,077 cubic yards, pertained to the Onset Channel contract work, and the remainder 385,316 cubic yards to the Cape Cod Canal channel proper.

17. The quantities of material deducted for excessive overdepth and side-slope dredging were determined from surveys, or by place measurement, and converted to scow measurement, in the ratio provided for such purpose in paragraph 4–05 of the specifications, that is, 100 cubic yards place measurement being the equivalent of 115 cubic yards scow measurement.

The parties are in accord as to the quantity of material removed by plaintiff in scows at the dredge, and plaintiff does not dispute defendant's computation of the amount of excess overdepth and side-slope dredging, to wit, 443,393 cubic yards; however, plaintiff does contend that defendant's determination of the quantity of material to be deducted is in error, on the ground that defendant did not reduce the excess material by 25 percent under paragraph 1–08 of the specifications.

18. In the Cape Cod Canal and Hog Island Channel the area to be dredged was laid out by the Government engineers in 9 cuts, each 35 feet wide, numbered 1 to 9 from South to North, and marked by stakes and ranges, as required by paragraph 2–01. In the Onset Channel, the side ranges were set so as to mark the margins of the 100-foot width, while in the Canal and Hog Island Channel the side ranges were set 5 feet inside or channelward of the outer contract limit line at the 32-foot depth on September 21, 1936, and on November 15, 1936 they were moved to 7½ feet inside of the outer margin limits at the 32-foot depth.

19. Plaintiff commenced its operations under direction of the contracting officer at Onset Channel.

During the course of performing the contract work sweep surveys of the bottom of the canal were made pursuant to paragraph 4–04 of the specifications. The purpose of such surveys was to determine whether the required contract depth had been attained. Promptly after such surveys were made the results thereof were plotted on maps which were furnished plaintiff showing designated areas where redredging was necessary. These maps not only showed the exact location of the shoal areas but also the character of material causing the shoals. After redredging was performed, further sweep surveys were made. Defendant's survey parties were in constant touch with plaintiff's representatives, and they made sweep surveys with reasonable promptness after an area was dredged. No protest was made by plaintiff against any delay in making sweep surveys or against furnishing plaintiff with the results thereof.

20. During the early stages of dredging operations, deductions for excess dredging were based entirely on final surveys made under paragraph 4–07 of the specifications after a section was fully completed. Plaintiff objected to deductions on a final survey (a survey made after all initial cuts, as well as redredging, were completed). The objection was based on the ground that a great amount of erosion took place during the intervals between the time of intermediate surveys, which were made closely behind dredging portions of a section, and the time of final surveys which were made after a section was entirely completed, and that for this reason the

final survey did not disclose accurately conditions as left by the dredge. As a result of plaintiff's objection, the method of basing deductions on final surveys only was changed three or four months after dredging was commenced. Survey parties were increased and more frequent sweep surveys of partially completed sections were made after dredging, in order to prevent deductions which might result from erosion occurring during the time of intermediate and final surveys in partially completed sections.

However, in areas where intermediate surveys were made and no dredging had been performed subsequent to the surveys which would subject the areas to any change the intermediate surveys were used as final and deductions were based thereon. In cases where initial dredging or redredging was performed after the intermediate surveys were made, a final survey was made after the entire section was completed and used for making deductions. The result of surveys covering the entire contract width and depth of a given section were plotted on cross sections which were furnished to plaintiff. The effect of using the intermediate surveys as stated was to reduce the amount of deductions for excess dredging by avoiding deductions for any areas where material was not removed by the dredge. Many surveys which were made after various cuts were dredged, but before dredging was completed in the various sections, were made in addition to those shown on these cross sections. The surveys shown on the cross sections are those used for computing deductions.

21. The intermediate surveys provided for in paragraph 4–04 of the specifications were made as promptly after dredging as conditions warranted. Dredging operations in the canal proper involved, in general, nine 35-foot cuts. Cut No. 1 was made on the south bank of the canal and Cut No. 9 on the north bank. Plaintiff in its operations did not complete sections of a uniform length. However, wherever practicable, defendant made final surveys under paragraph 4–07 of sections ranging from 500 to 1,000 feet in length and these sections were finally accepted. The length of section offered for acceptance was dependent upon plaintiff's operations. In numerous instances plaintiff dredged single cuts, ranging

from 2,000 feet to more than 4,000 feet in length, and generally, considerable periods of time would elapse between the first and final dredging. For instance, between stations 450 and 460 dredging was commenced on July 1, 1936, and the final dredging in that area was not completed until November 19, 1936; between stations 210 and 220 dredging was commenced on March 23, 1937 and the section was completed November 1, 1937; between March 19, 1937 and May 8, 1937, plaintiff dredged a single cut from station 205 to 225 (2,000 feet). Commencing April 2, 1938, the dredge operated between stations 230 and 268 (3,800 feet) without completing any section; between stations 220 and 230 the first dredging was performed in April 1937, and the final dredging on December 14, 1937; between stations 340 and 380 the first dredging was performed January 26, 1937, and the final dredging April 2, 1938. On some occasions single cuts as long as 4,400 feet were made without completing a section.

The proof is that if the contractor had uniformly dredged all 9 cuts in lengths, ranging from 500 to 1,000 feet, before proceeding to dredge in other areas, final surveys for deduction purposes could have been made more promptly after dredging. The intermediate surveys provided for in paragraph 4–04 of the specifications were made with reasonable promptness after plaintiff's dredging as warranted by the existing conditions.

22. At all times during the performance of the dredging work, there was a Government inspector on the dredge, one of his duties being to see that the dredge was kept on the ranges, and at the end of each forward move, consisting of 15 or 17 feet, the dredge was anchored or pinned up on spuds to keep it in place. In dredging the side cuts, the dredge was kept far enough inside of the area lines to permit of no substantial digging beyond the specified limit lines. It was kept as closely as possible to the 5- or 7½-foot range inside of the bottom limits as established by defendant's engineers. All of the material dredged and removed by plaintiff on the side slopes was dredged substantially within the limits indicated by the stakes and ranges.

23. Over the entire canal area embraced within plaintiff's contract the surveys used for making deductions for excess

side-slope dredging were, with one exception, made prior to the time of completion of final redredging, but not with the frequency and not as closely behind the dredging operations as were the surveys on the bottom of the canal. The exception was in the section between stations 444 and 470. There the final dredging was completed November 19, 1936, and the final survey of the entire section was completed December 4, 1936. The evidence also shows that surveys on which deductions were computed for excess dredging on the bottom in the canal proper were, in some instances, made prior to the time of completion of final redredging. Further, that the surveys on which deductions were computed for excess dredging, both on the bottom and side slopes in the Onset Channel work, were made promptly after completion of final redredging. Except at the sections listed below, all surveys used for making deductions were made prior to completion of final redredging:

Between stations 220 and 230 the last dredging on the bottom was done on December 14, 1938. The final survey was made on December 16, 1938.

Between stations 250 and 260 the last dredging on the bottom was completed on July 20, 1938. The final survey was made on July 22, 1938.

Between stations 260 and 295 final dredging on the bottom was done on August 16, 1938, and the final survey was made August 19, 1938.

Between stations 295 and 340 the final dredging on the bottom was performed April 2, 1938, and the final bottom survey was made on April 4, 1938.

On the Onset Channel work the final dredging was completed August 17, 1936, and the final survey on which deductions were made was completed on August 19, 1936.

24. Plaintiff uniformly dredged to the maximum allowable overdepth dredging limits instead of confining its dredging operations to the required 17-foot and 32-foot depths.

Also, on many occasions the dredge dug considerably below 35 feet, to depths ranging from 37 feet to 39½ feet. As a result, plaintiff dredged on several occasions below the 35-foot level in the channel proper and below 20 feet in Onset Channel. Plaintiff's dredge operators consistently dredged

to a depth of approximately 35 feet, the maximum allowable overdepth plane in the Canal work, instead of to the required 32-foot depth, and they consistently dredged to a depth of 20 feet while dredging in the Onset Channel instead of dredging to the required 17 feet. In dredging on the bottom when the dredge bucket approached the point where the 35-foot line intersected the side-slope line, the dredge continued to excavate to a depth of 35 feet close to the intersecting line, though not directly up to the line.

The maximum quantity of yardage estimated as being present in the 3-foot overdepth dredging area and available for removal was 807,200 cubic yards, scow measure. This yardage pertained to the bottom only. In making the estimate on which its bid was based, plaintiff estimated on receiving payment for the full amount of allowable overdepth dredging. Plaintiff actually removed and received payment for 656,023 cubic yards, or 81.3% of the available material.

25. Dredging to the maximum overdepth dredging limits was not necessary to provide the required 17-foot and 32-foot depths, but it was done voluntarily by plaintiff to increase the quantity of pay-yardage, and resulted in material overdepth dredging and erosion on the bottom of the canal.

26. Plaintiff in its dredging operations on the side-slope dredged within the limits of the range on the stakes fixed by defendant's engineers for its guidance, and within the contract limits, and it dredged immediately up to these limits. In carrying out this dredging, in addition to the material removed by the dredge, a large amount of material loosened by the dredge fell to the bottom. The dredging operation also caused a large amount of the loose sandy material to erode, much of it being carried away by the current and some being deposited on the bottom. All material on the bottom, within the contract area, both that falling from dredging and that deposited by erosion, was removed by plaintiff within the contract area to conform to the given measurements on the bottom of the canal.

At times surveys of the side slopes were not made promptly after dredging and the erosion was continuing with no survey until a survey could be made, which was no fault of

plaintiff. Defendant had knowledge that erosion was considerable in the contract area during dredging operations. The proof shows that during one dredging operation an entire bank was observed to disappear by erosion in the current. Further, that when the submerged dipper left the bank the material would be high above the dipper, but when the surface of the water was reached the material above the dipper had been washed away.

27. The first dredging performed under the contract was at Onset Channel. A deduction for excess dredging in Onset Channel was made in the estimate covering payments for the month of August 1936. No protest was made by plaintiff at the time this deduction was made. In computing the deduction for Onset Channel work, the defendant's resident engineer allowed payment for three feet excess dredging on the side slopes, on the ground that such an allowance had been made on other contract work. This allowance was made without the authority of the contracting officer. The contracting officer ruled shortly after this allowance was made that under the terms of the contract the pay limits on the slope extended to the contract side-slope line and that no payment would be made for material removed beyond those lines, and he so informed the resident engineer. By letter dated October 14, 1937, plaintiff was advised by the contracting officer that he proposed to deduct 22,000 cubic yards of dredging which represented the excess dredging allowed on the side slopes of the Onset Channel. However, no such deduction was subsequently made. This work had already been finally accepted. Paragraph 4–07 of the specifications provides that final acceptance of a part of the work and deductions made thereon will not be reopened except for causes named which are not here material.

28. Plaintiff's contention that the excess areas for which deductions were made for excess overdepth dredging are chiefly areas resulting from erosion, and that the surveys on which the deductions were computed do not accurately show conditions as left by the dredge, is not supported by the evidence. There was erosion in the bottom but there is no proof showing what part, if any, of the areas outside the

contract limits on the bottom of the canal for which excess dredging was deducted should be attributed to erosion, and the proof establishes that in areas where the defendant had determined that material was removed by erosion such areas were excluded in making deductions for excess dredging.

29. The proof is that both erosion and fill are continually taking place in the canal, principally during the process of dredging. The current in the canal is reversed every six hours, and the maximum current is about six miles per hour. Thus the velocity is sufficiently high to carry sand when placed in suspension. When sand is placed in suspension it moves back and forth, the direction depending on the tide in the canal. As a result, this velocity causes fill in some places and erosion in others. In some places where plaintiff had dredged beyond the pay limits, the excavated area would fill up when the tide changed. Likewise at other places erosion would occur. In order to determine what effect, if any, erosion would have on enlarging areas outside the contract limits, a study was made by the defendant in the area between stations 395 and 405. This study disclosed that in this particular area the excess areas were larger in volume by 500 cubic yards at the time dredging was discontinued than they were four months later because of fill which occurred after dredging was completed. In a study of the area between stations 447 and 457 surveys made before dredging and five months thereafter disclosed that in that particular area the excess areas were larger at the time dredging was completed than five months later because of material which was deposited by the current. The situation is not disclosed as to the other areas covered by plaintiff's contract.

30. Payment has been made to plaintiff for all material removed within the allowable overdepth dredging area, including both earth excavation and boulders. In addition, plaintiff has been paid at the contract rate of $12.50 per cubic yard for all boulders removed, whether or not the boulders came from within the contract area. There were removed from the entire contract area 4,563 boulders, involving 16,255.4 cubic yards.

The proof is not satisfactory to show what effect, if any, the boulders encountered, which were either removed or buried, had on the deductions made for excess dredging, and that it is impossible to even approximate the excess yardage involved in handling boulders. Boulders were buried only in cases where absolutely necessary; all boulders which were of such size as could be handled with the dredge were removed. Plaintiff's dredge *Crest* could remove without difficulty boulders ranging in size from 12 to 15 cubic yards. It was capable of removing boulders up to 22 cubic yards in size, but some difficulty was encountered in getting them into the dredge bucket. Over the entire contract area about 25 boulders were buried.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the sum of $151,862.11, the deductions made by defendant for 443,393 cubic yards of alleged excess overdepth and overslope dredging.

Plaintiff had a contract for performing certain dredging work in Cape Cod Canal and in Hog Island Channel in Buzzards Bay, Massachusetts, including the dredging of a channel leading into Onset Bay. Plaintiff was required to dredge the channel leading into Onset Bay to a depth of 17 feet over a bottom width of 100 feet. It was required to dredge a channel in the Cape Cod Canal to a depth of 32 feet over a bottom width of 315 feet. To cover inaccuracies in the dredging process, an excess depth of 3 feet was allowed, for which payment was to be made. Payment was also to be made for all material removed from the sides up to a line running upward from the edge of the bottom of the cut on a slope of one foot vertical to 2½ feet horizontal.

After the work had been completed it was ascertained as a result of soundings and sweepings that 443,393 cubic yards had been removed beyond the allowable depths and side slopes. Of this amount 258,005 cubic yards were deducted for excessive side-slope dredging and 185,388 cubic yards for

excessive overdepth dredging. Of this quantity 28,527 cubic yards for excessive overdepth dredging and 29,550 cubic yards for excessive side-slope dredging pertained to the Onset Channel work. Payment for all this yardage, except that in the Onset Channel, having been refused, plaintiff brought this suit.

On page 132 of its brief plaintiff sets out its three propositions upon which it relies for relief. Summarized, they are as follows: (1) the failure of the contracting officer to prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut; (2) defendant's failure to make sounding surveys behind the dredging as the work progressed to determine whether there was excessive overdepth or side-slope dredging; (3) its failure to reduce the quantity of excessive overdepth and side-slope dredging by 25 percent to eliminate material removed by erosion.

It is not disputed that 258,005 cubic yards of material have been removed from the side slopes more than the specifications called for, nor that 185,388 cubic yards have been removed from the bottom more than that called for by the specifications.

1. Plaintiff says that some of the excess material on the bottom was removed by erosion and, therefore, it says, it was improper to make any deduction therefor. All deductions made were from material actually removed by plaintiff, as shown by scow measurements. The amount to be deducted was ascertained by surveys of the bottom and sides made as the work progressed or by intermediate surveys or by final surveys made after a particular section of the work was completed. It is not disputed that these surveys showed that the stated amount of excess materials had been removed, whether by dredging or by erosion; and we are of the opinion that, even though some of it was removed by erosion, the deductions were properly made under the provisions of the specifications.

Section 4–04 provides for the measurement in the scows of the material removed and for soundings or sweepings to be taken "behind the dredge as the work progresses". This

was for the primary purpose of determining whether or not the required depth had been reached; but if it should disclose also that there had been excessive side-slope dredging or excessive dredging in the bottom, the specifications provided that deductions therefor were to be made from the monthly estimates. These soundings and sweepings, however, rarely, if ever, disclosed with accuracy the extent of the excessive overdepth or side-slope dredging, and deductions were not based upon them, but were based on intermediate or final surveys. Intermediate surveys were used where possible so as to eliminate deductions caused by later erosion; but where further dredging had to be done after the intermediate surveys, deductions were based upon the final surveys.

The use of the final surveys to determine the deductions in some instances was in accord with the provisions of paragraph 4–07 of the specifications. This reads:

> *Final Examination and Acceptance:* As soon as possible after the completion of such sections established in paragraph 1–02 or subdivision thereof as in the opinion of the contracting officer will not be subject to injury by further operations under the contract, such area will be examined thoroughly by sounding and by sweeping, as deemed advisable by the contracting officer.
>
> * * * * *
>
> Final acceptance will be subject to proper deductions or correction of deductions already made on account of excessive overdepth or excessive side-slope dredging (par. 4–03), and any such deductions or correction of deductions will be included in the next monthly estimates. * * *

Plaintiff complains that the soundings and sweepings were unduly delayed, but this complaint is not justified by the testimony. We are of opinion that the defendant made them as promptly as possible in order to eliminate so far as it could deductions of materials removed by erosion.

Furthermore: Paragraph 1–02 of the specifications shows that what the defendant wanted was a depth of 32 feet in the Cape Cod Canal and a depth of 17 feet in the channel leading into Onset Bay. The provision for an allowable overdepth

of 3 feet was only "to cover inaccuracies of the dredging process," and not because defendant wanted this depth, as is shown by paragraph 4-03 of the specifications. It was recognized that a contractor undertaking to get the desired depth of 32 feet would of necessity sometimes go beyond the 32 feet; so, the defendant agreed to pay it for the yardage removed beyond the 32-foot depth up to 3 feet beyond. But the findings show that the contractor did not try to limit its dredging to a 32-foot depth, but deliberately dredged to a depth of 35 feet throughout the channel, and on many occasions dredged to depths ranging from 37 to 39½ feet. This was in order to secure payment for the excess yardage. If plaintiff had followed the spirit of the contract and had not intentionally dredged below the depth of 32 feet, it is not unreasonable to assume that erosion would not have removed material below the 35-foot level, and no deduction would have been made from scow measurement for materials removed by erosion from below this level.

The contractor dredged to a depth of 35 feet notwithstanding the fact that it was put on notice by paragraph 1-08 of the specifications that experience under recent contracts had shown that about 25 percent of the material required to be taken out had been removed by erosion, making it necessary for the contractor to remove by dredging only 75 percent of the materials which it was desired to remove.

Although defendant did not desire a depth of more than 32 feet, and although plaintiff deliberately dug to a depth of 35 feet, the defendant nevertheless paid it for all materials removed to the 35-foot level. The specifications in article 4-03 expressly say that materials removed from beyond this level will be deducted from the scow measurements "and will not be paid for."

2. Plaintiff's chief contention with respect to the excess materials removed from the side slopes is based upon its assertion that the specifications required the contracting officer to provide for overcuts to take care of the material which slid down into the bottom from the sides, and that under the specifications it was entitled to payment for the

material removed from these overcuts. It is true that paragraph 4–03 of the specifications does provide that:

> The contracting officer will prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut, and material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for.

It is also true that the contracting officer did not prescribe any overcuts. Notwithstanding this, we do not think that plaintiff is entitled to recover for the excess material removed from the sides.

In the first place, the specifications in paragraph 4–03 expressly say, "Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive over-depth dredging or excessive side-slope dredging* and will not be paid for." (Italics in original.) This means, of course, that materials taken from beyond the side-slope "pay line," however taken, whether by dredging or by erosion, will not be paid for. The defendant was willing to pay for all material removed up to a line of 1 on 2½, but if the plaintiff by its dredging operations or as a result of its dredging operations removed more materials than this, defendant expressly said it would not pay for it. Plaintiff knew that some material from beyond this line would probably be removed by erosion, and it is faced with the fact that the specifications expressly say that this material will not be paid for.

In the second place, paragraph 4–03 of the specifications does not make it mandatory upon the contracting officer to prescribe any particular overcut. He might have prescribed an overcut of 10 feet, of 5 feet, of 3 feet, of 1 foot, or 6 inches, or none at all, depending upon what he thought was necessary under the circumstances. In determining whether overcuts were necessary the contracting officer, no doubt, concluded, since plaintiff was consistently going to a depth of 35 feet, whereas the defendant desired only a depth of 32 feet, that such material as would slide down from the banks would not

fill up the bottom of the channel to a depth of less than 32 feet desired by the defendant and, hence, it was not necessary to prescribe any overcuts.

But, whether or not this was the reason actuating the contracting officer in not prescribing any overcuts, nevertheless there was no duty cast upon him to prescribe any particular overcut and, therefore, plaintiff cannot say just how much of the deduction was due to the contracting officer's failure to prescribe overcuts. Even though paragraph 4–03 does make it mandatory upon the contracting officer to prescribe some overcut, plaintiff necessarily is unable to show how much of the deduction was due to his failure to prescribe any.

3. It seems plain from what we have already said that plaintiff's third contention, to wit, that the defendant made no allowance in making its deductions for the material removed by erosion, is without merit. Had plaintiff not deliberately dredged to the 35-foot "pay limit" and had it not dredged immediately up to the permissible side-slope, but had followed proper engineering practice and dredged only so close to the side slopes as was necessary to remove all of the material required to be removed, whether by dredging or by erosion, and had it undertaken to obtain only a 32-foot depth, there might be some merit in plaintiff's contention; but there is none, we think, in view of the procedure deliberately followed by it.

4. Heretofore we have referred to the work done in the Cape Cod Canal. What we have said is equally applicable to the work in the channel to Onset Bay, except in one particular: In the Cape Cod Canal the representative of the contracting officer on the job set the range limits of the channel to be dredged, at first, 5 feet channelward from the edge of the required width. This was on the assumption that the average overdepth would be 2 feet, and, by setting the stakes at this point, the required side-slope would be obtained. Later, when he observed that plaintiff was dredging to the full allowable overdepth of 3 feet, he then set his stakes in 7½ feet from the edge of the required width. On the other hand, in the channel to the entrance of Onset Bay the contracting officer's representative set his stakes at the edge of the full 100-foot width required. Partly as a result of this,

possibly, since it dredged up to the very limit of the ranges fixed, plaintiff dredged 3 feet beyond the required slope.

But, whether or not the placing of the stakes at the extreme limit of the width to be obtained was in any part responsible for this excessive dredging, plaintiff is not entitled to recover, because it has been paid for this excessive dredging. The contracting officer was of opinion that it was not entitled to be paid therefor, and proposed to make a deduction for the excess, but this deduction was never made.

We are of opinion that the deductions made were properly made and that plaintiff is not entitled to recover. Plaintiff's motion is overruled and its petition will be dismissed. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge;* and JONES, *Judge*, took no part in the decision of this case.



CASES DECIDED

IN

THE COURT OF CLAIMS

July 1, 1945, to November 30, 1945

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 45019. OCTOBER 1, 1945

Wilson & Co., A Corporation.

Government contracts for purchase of meat, meat food products and packing house products; offsets against plaintiff on account of asserted overpayments by defendant under other contracts with plaintiff or its affiliated companies resulting from including an amount equivalent to the processing tax in the price paid by defendant to plaintiff or its affiliates for hog products purchased under said other contracts, although plaintiff or its affiliates had not paid such tax.

Upon an offer by plaintiff in the instant case and its affiliated companies in seven other related cases to compromise and settle their claims in all eight cases for the sum of $55,000, which offer was accepted by the Attorney General; and upon a stipulation showing that in such compromise and settlement the sum of $478.68 should be allocated to the instant case; and upon a report of a commissioner of the court recommending that judgment be entered for the plaintiff in said sum, it was ordered October 1, 1945, that judgment for the plaintiff be entered in the sum of $478.68.

No. 45020. OCTOBER 1, 1945

Wilson & Co., A Corporation.

Government contracts for purchase of meat, meat food products and packing house products; offsets against plaintiff on account of asserted overpayments by defendant under

other contracts with plaintiff or its affiliated companies resulting from including an amount equivalent to the processing tax in the price paid by defendant to plaintiff or its affiliates for hog products purchased under said other contracts, although plaintiff or its affiliates had not paid such tax.

Upon an offer by plaintiff in the instant case and its affiliated companies in seven other related cases to compromise and settle their claims in all eight cases for the sum of $55,000, which offer was accepted by the Attorney General; and upon a stipulation showing that in such compromise and settlement the sum of $10,184.51 should be allocated to the instant case; and upon a report of a commissioner of the court recommending that judgment be entered for the plaintiff in said sum, it was ordered October 1, 1945, that judgment for the plaintiff be entered in the sum of $10,184.51.

No. 45191. October 1, 1945

Wilson & Co., A Corporation.

Government contracts for slaughtering and processing of cattle and hogs and storing of defendant's products derived therefrom; offsets against plaintiff on account of asserted overpayments by defendant under other contracts with plaintiff for yardage and feeding charges, and on account of asserted overpayments resulting from including an amount equivalent to the processing tax in the price paid by defendant to plaintiff or its affiliates under a number of contracts for the purchase of hog products, although plaintiff or its affiliates had not paid such tax.

Upon an offer by plaintiff in the instant case and its affiliated companies in seven other related cases to compromise and settle their claims in all 8 cases for the sum of $55,000.00, which offer was accepted by the Attorney General; and upon a stipulation showing that in such compromise and settlement the sum of $41,550.57 should be allocated to the instant case; and upon a report of a commissioner of the court recommending the entry of judgment for the plaintiff in said sum, it was ordered October 1, 1945, that judgment for the plaintiff be entered in the sum of $41,550.57. (See *John Morrell & Company* v. *United States*, 94 C. Cls. 490.)

No. 45581. October 1, 1945

Colonial Sand & Stone Co., Inc., A Corporation.

Government contract for the purchase of crushed stone, cinders, etc. Upon a stipulation filed by the parties, and an agreement by the plaintiff to compromise its claim of $18,-623.37 for the sum of $14,898.70 and the dismissal of the defendant's counterclaim of approximately $25,000.00 with prejudice and upon defendant's agreement that judgment be entered against the United States and in favor of the plaintiff in the sum of $14,898.70, and that defendant's counterclaim be dismissed with prejudice; and upon a memorandum report of a commissioner of the court recommending the entry of judgment for the plaintiff in the sum stated; it was ordered October 1, 1945, that judgment for the plaintiff be entered in the sum of $14,897.70 and that defendant's counterclaim be dismissed.

No. 44537. October 1, 1945

Anna Rosenbloom, et al., Executors.

Claim for increased costs under the National Industrial Recovery Act. In accordance with the provisions of the Act of June 25, 1938 (52 Stat. 1197) and a stipulation by the parties, it was ordered that judgment for the plaintiffs be entered in the sum of $850.00.

No. 45650. November 5, 1945

Harry B. Stott.

Pay and allowances; bachelor officer in the United States Navy, with dependent mother.

Decided January 8, 1945; plaintiff entitled to recover. Opinion 102 C. Cls. 811.

Upon plaintiff's motion for judgment, and upon a report from the General Accounting Office showing the amount due in accordance with the opinion of the court to be $1,-689.77, it was ordered November 5, 1945, that judgment for the plaintiff be entered in the sum of $1,689.77.



CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON OCTOBER 1, 1945

45232. Trust Company of Georgia, Executor.
45512. Lawrence Greenwald.
45513. Ivan Selig.
46030. Strathmore Paper Company.
46072. Seattle District No. 3 Mantle Club.
46209. Elizabeth W. Van Ingen.

ON NOVEMBER 5, 1945

45953. Stanley Clarke, Trustee, etc.
46062. Gay Games, Incorporated.

Cases Pertaining to Government Contracts

ON OCTOBER 1, 1945

43810. Joseph A. Holpuch Company.
43811. Joseph A. Holpuch Company.
43815. Joseph A. Holpuch Company.

ON DECEMBER 5, 1945

46689. Breeze Corporation.

Claims for Extra Compensation for Overtime Services as Customs Inspectors

ON NOVEMBER 9, 1945

45463. Henry F. Ogden.
45465. Willis J. Pace.
45831. William C. Bliss.
45832. Walter E. Bushey.
45835. William E. Fifield.
45836. Henry D. Godfrey.
45838. Eugene D. Haire.
45841. Wayne S. Howe.
45846. Henry E. Mooney.
45847. Emile E. Revoir.
45848. William C. Towle.
45849. Max D. Valiquette.
45850. Harold L. White.
45851. Henry G. Webster.
45852. Stacy W. Willey.
45854. Samuel C. Neiburg.
45865. Clyde A. Jefts.
45943. John W. Thomas.
45944. Wendell W. Thurber.
46496. Walter Trominski.

ON DECEMBER 3, 1945

46156. Allen W. Frank.
46166. Henry J. Kelleher.
46173. Frank J. Mahany, Jr.
46180. Daniel B. Neville.
46186. Carlton C. Rose.

Cases Pertaining to Indian Claims

ON DECEMBER 3, 1945

L–132. The Seminole Nation.

L–133. The Creek Nation.

Cases Pertaining to Property Requisitioned

ON OCTOBER 1, 1945

46229. Bay and River Navigation Company.

46251. Templeton Crocker.

Case Pertaining to Infringement of Patent

ON DECEMBER 3, 1945

45346. News Projection Corporation.

Miscellaneous

ON JUNE 9, 1945

46315. John Jacob Jansen.

ON OCTOBER 1, 1945

45092. Oahu Railway and Land Company.

45743. John J. Wilkinson, Trustee.

46316. Graystone Amusement Company.

REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

HERBERT M. GREGORY v. THE UNITED STATES

[No. 45570]

[102 C. Cls. 642; 326 U. S. —]

Income tax; mailing notice to "last known address"; suit under special jurisdictional act; tort action for alleged wrongful mailing. Petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 8, 1945.

Rehearing denied.

ULDRIC THOMPSON v. THE UNITED STATES

[No. 42837]

[102 C. Cls. 402; 326 U. S. —]

Patent for boring mechanism, No. 1,238,362; infringement; lack of invention. Petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 8, 1945.

Rehearing denied November 13, 1945.

THE SEMINOLE NATION v. THE UNITED STATES

[Nos. L-51 and L-208]

[102 C. Cls. 565; 326 U. S. —]

Indian claims; findings of fact upon remand by the Supreme Court as to corruption, venality and failure to

comply with fiduciary obligation in disbursement of tribal funds. Petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 8, 1945.

EARL S. WORSHAM, TRADING AS WORSHAM BROTHERS, v. THE UNITED STATES

[No. 44070]

[103 C. Cls. 378; 326 U. S. —]

Government contract; certificate of Government agent not supported by the evidence is not binding on the Court of Claims. Petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 8, 1945.

ROSS ENGINEERING COMPANY, INC., A CORPORATION, v. THE UNITED STATES

[No. 45198]

[103 C. Cls. 185; 326 U. S. —]

Government contract; misrepresentation; contractor's knowledge of conditions. Petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 8, 1945.

STANDARD ACCIDENT INSURANCE COMPANY AND ALBERT E. MC KENZIE AS TRUSTEES IN BANKRUPTCY OF THE GRAVES-QUINN CORPORATION v. THE UNITED STATES

[No. 46004]

[103 C. Cls. 607; 326 U. S. —]

Government contract; no breach of contract by sovereign acts of defendant. Defendant's demurrer sustained.

Plaintiffs' petition for writ of certiorari *denied* by the Supreme Court October 8, 1945.

THE CHICKASAW NATION, PETITIONER v. THE UNITED STATES
THE UNITED STATES, PETITIONER, v. THE CHICKASAW NATION

[No. K-334]

[103 C. Cls. 45; 326 U. S. —]

Indian claims; suit for value of lands taken by Government by erroneous survey. Proceedings under rule 39 (a). See 94 C. Cls. 215. Petition dismissed.

Plaintiff's petition and defendant's petition for writ of certiorari *denied* by the Supreme Court October 15, 1945.

BERG SHIPBUILDING COMPANY, A CORPORATION, AND GEORGE NELSON, SURETY FOR THE BERG SHIPBUILDING COMPANY, v. THE UNITED STATES

[No. 45256]

[103 C. Cls. 102; 326 U. S. —]

Government contract; corporation dissolved under State statute for failure to pay license fee. Petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 15, 1945.

THE ARUNDEL CORPORATION v. THE UNITED STATES

[No. 45655]

[103 C. Cls. 688; 326 U. S. —]

Government contract; amount of work on dredging operation decreased by hurricane; "Changed Conditions" clause not applicable to an act of God. Petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 15, 1945.
Rehearing denied November 13, 1945.

THE CHICKASAW NATION, PETITIONER, v. THE UNITED STATES

[No. K-544]

[103 C. Cls. 1; 326 U. S. —]

Certiorari to review a judgment of the Court of Claims in a suit brought under special jurisdictional acts, as amended, for claims arising out of Indian treaties and agreements or Acts of Congress relating to Indian affairs; application of gratuities as offsets.

The judgment of the Court of Claims was *reversed* November 5, 1945, and the case remanded for further proceedings in conformity with the opinion of the Supreme Court, as follows:

Per curiam: The Chickasaw Nation asks certiorari to review a judgment of the Court of Claims, 103 Ct. Cls. 1, dismissing its suit for moneys allegedly owing to it by the United States. Some of petitioner's claims were denied below, but others, totalling $22,858.78, were allowed. Against this amount the court below, applying section 2 of the Act of August 12, 1935, 49 Stat. 571, 596, offset a like amount which the court found to have been gratuitously expended by the United States for the benefit of the Nation. The findings listed various items of gratuity expenditures totalling $69,920.39. But the judgment did not specify which of these items were being applied as offsets to the claims allowed. Instead, all of the offset items were treated as commingled in a single gratuity fund upon which the Government might draw for the discharge of its obligations, as upon a bank account.

In *Seminole Nation* v. *United States*, 316 U. S. 286, 308, we pointed out that the gratuity items which have been used as statutory offsets to Indian claims against the Government should be specifically designated in the judgment. When that course is not followed,

Indian claimants desirous of challenging the allowed offsets on appeal must be prepared to attack all the items which make up the fund, however much it may exceed their claims. Moreover, such a judgment, by leaving unidentified the particular gratuities which have been applied as offsets, necessarily adjudicates the validity for that purpose of all, since it makes all proportionately applicable as offsets. There is no reason why Indian claimants should be required in some subsequent suit to meet the defense that gratuity items whose offset was not necessary to the result in an earlier case have nevertheless been there finally adjudicated to be valid offsets, or why this Court, in reviewing the earlier judgment, should be required to pass on the validity of such items as offsets. When specified items of gratuity are allocated as offsets, other items, included in the findings but not applied as offsets, do not affect the judgment, their validity as offsets need not be reviewed on appeal, and they create no estoppel for future cases.

The gratuity items included among the findings below as available for offset are there described as "incorporated by reference" from findings in a "companion case" decided by the Court of Claims on the same day (*Chickasaw Nation* v. *United States*, 103 Ct. Cls. 45, petition for certiorari denied October 15, 1945, No. 169 this term, *infra* p. —), in which none of the gratuities found were used, nothing having been found due from the United States on the claims there advanced. The petition before us makes no objection to this procedure, and in view of the failure to apply such items as offsets in the companion case, we assume that their validity as such was open to objection in the present suit. We only conclude that the judgment here should be in such form as not to compel unnecessary adjudication of such objections on appeal, or unnecessarily to foreclosure consideration of such objections to the use of these items as offsets in some future litigation.

The petition for writ of certiorari is granted, limited to the question whether the particular gratuity items necessarily used as offsets should be designated by the judgment. The judgment is reversed and the cause remanded to the Court of Claims for further proceedings in conformity to this opinion.

THE UNITED STATES, PETITIONER, v. HORACE HAVEMEYER

[No. 45775]

[103 C. Cls. 564; 326 U. S. —]

Gift tax; method of determining fair market value of large blocks of stock; evidence as to fair market value.

Decided April 2, 1945, judgment for plaintiff.

Defendant's petition for writ of certiorari *denied* by the Supreme Court November 5, 1945.

ALLEN POPE, PETITIONER, v. THE UNITED STATES

[No. 45704]

[100 C. Cls. 375, 104 C. Cls. 496; 323 U. S. 1; 326 U. S. —]

Government contract; decision upon remand by Supreme Court holding that Special Jurisdictional Act created new causes of action; judgment awarded in accordance therewith.

Decided October 1, 1945; judgment for plaintiff.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court January 2, 1946.

Rehearing denied February 4, 1946.

INDEX DIGEST

AGRICULTURAL ADJUSTMENT ACT.

I. Where it is shown that plaintiffs wrongfully and in violation of their agreements under the Agricultural Adjustment Act of 1933 and the Agricultural Conservation Program of the Government during the years 1933 through 1936 withheld from their tenants and sharecroppers their proportionate parts of Government payments; and where it is also shown that certain of such payments were made to plaintiffs under mistakes as to the extent of plaintiffs' compliance with these programs, induced in some instances by false representations on the part of plaintiffs; it is *held* that the defendant is entitled to offset a portion of the amounts so paid to plaintiffs against a payment claimed to be due to plaintiffs on account of their compliance, on their lands, with the 1938 Agricultural Conservation Program under the Soil Conservation and Domestic Allotment Act of 1936, and plaintiffs' demurrer is therefore overruled. *Crain and Wilson* (No. 45779), 713.

II. Where the Secretary of Agriculture on April 9, 1941, after an investigation, determined that in connection with certain transactions relating to the contracts and agreements under the Agricultural Adjustment Act of 1933 plaintiffs had wrongfully and unlawfully retained for their own use, in breach of their express promises, large sums due to them for the benefit of others and had made false representations to defendant, upon which defendant had relied; it is *held* that

CONTRACTS—Continued.

claimed by plaintiff, and plaintiff is not entitled to recover liquidated damages deducted for delay caused by the inspector's orders. *Id.*

XXII. Where plaintiff entered into a contract with the Government to construct 16 officers' quarters at Fort Sam Houston, Texas; and where plaintiff presented claims for the alleged extra expense involved in securing spiral and upright reinforcements, for an increase in the union wages, for an increase in lumber prices, for a short payment on footing depths, and for recovery of liquidated damages withheld; it is *held* that the method of securing the reinforcements was optional and the plaintiff failed to prove that any extra expense was involved in placing them. Reimbursements for the increase in wages should have been made since the contract specifically provided for such a contingency, and plaintiff is entitled to recover the difference. The increase in lumber prices should have been anticipated by plaintiff and recovery for this item is denied. *Holpuch Company* (No. 43809), 254.

XXIII. Where the two provisions of the contract relating to footing depths were inconsistent; it is *held* that the provision allowing price adjustments for both additions and deductions in the work was the clause that should prevail. *Id.*

XXIV. The delays that occurred were the fault of the Government, which had prevented plaintiff from performing excavation work when necessary. However, plaintiff failed to notify the contracting officer of the cause of the delay so that an extension of time could be granted, and plaintiff is not entitled to recover liquidated damages withheld. *Id.*

XXV. Where plaintiff contracted to construct 16 officers' quarters for the Government at Fort Sam Houston, Texas; and where claims were presented for work on spiral spacers, an increase in wages, an increase in lumber costs, payment for footing depth work, and remission of liquidated damages; it is *held* that plaintiff was entitled to recover for increased wages and for the work of footing depths, but since insufficient proof was presented concerning the spiral spacers and

CONTRACTS—Continued.

an authorized public officer, the effect of which was to fix rates and terms on which those entitled to power from the dam would get it; and the Government, as the vendor of power, should not be permitted to change those schedules to the prejudice of one of the purchasers, by denying to plaintiff the benefits of a load-building period for the 3 years beginning June 1, 1940. *Id.*

XXX. The Secretary of the Interior refused to approve an interim contract with the plaintiff on the terms of the "Memorandum of Understanding" of October 3, 1934, under which contracts with others were made at the 0.5 mill rate; and after further negotiations, an interim contract with plaintiff was made on July 22, 1937, under which, besides other things, plaintiff was bound to take a stipulated amount of power per year, designated as "firm" power, at the 1.63 mills rate, and under which plaintiff was granted a load-building period. Article 33 of the contract provided that if more favorable rates should be granted to any other allottee or contractor, then the plaintiff should not thereafter be required to pay more than those rates, except that Article 33 was not to apply to rates for the temporary resale of power allotted to the Metropolitan Water District. *Held,* That plaintiff is entitled to recover the difference between what it paid for interim power and what it would have had to pay at a rate of 0.5 mill (Case No. 45916). *Id.*

XXXI. The interim power to which plaintiff was entitled under the contract of July 22, 1937, was not "firm" power, as that term was used in the Regulations, lease and contracts other than the interim contract with plaintiff; "firm" power being defined in those other documents as power which the Government agreed to deliver and the taker had the right to demand; whereas the power referred to in plaintiff's interim contract was secondary power, because it was not agreed to be delivered and was expressly made subject to the priorities of the City of Los Angeles, and subject also to be shared, if necessary, with others. The rate, set by public regulation and by agreement, applicable to

CONTRACTS—Continued.

XLVI. Where the plaintiff submitted its bid without seeking a clarification of the provision of the contract relating to the preparation of certain tree pits, which were shown on the drawings as outside the property line of the project; and where the decision of the contracting officer against plaintiff's contention, affirmed on appeal by the head of the department, is found to be sustained by the evidence; it is *held* that the plaintiff is not entitled to recover. *Id.*

XLVII. In computing the plaintiff's damages resulting from the delays caused by the Government's breaches of contract, there is included compensation for machinery owned by the plaintiff and rendered idle by the delay, and because of the absence of wear and tear upon it, the award is upon the basis of one-half of the fair rental value of the machinery. *Brand Investment Company* v. *United States*, 102 C. Cls. 40, certiorari denied, 324 U. S. 850, cited. *Id.*

XLVIII. A proportionate part (in the instant case, substantially all) of the plaintiff's main office overhead for the period of delay is included in the award of plaintiff's compensation for delay by the Government. *Brand Investment Company* v. *United States*, *supra*. *Id.*

XLIX. Increases in salaries made after the instant contract was substantially completed, going to officers of the company who were substantial owners thereof and representing in effect a distribution of profits, are not included in office overhead for the purpose of computation of the amount due as compensation for delay. *Id.*

L. Where the contract in suit was completed within the contract time, as extended by change orders; and where such change orders each extended the time of performance by a specified number of days; and where some of these change orders involved new or different work, not contemplated by the original contract; and where there was no relation between these change orders and the delays involved in the instant suit, which the court has found to constitute breaches of the contract; it is *held* that the acceptance of the change orders does not foreclose the plaintiff from a remedy for

CONTRACTS—Continued.

(B) For excavation of 287 cubic yards of cave-ins at $17 per cubic yard, due to omission of side-wall lagging by contracting officer's direction, $4,879.00.

(C) For filling with concrete the 287 cubic yards of caved-in spaces at $17 per cubic yard, $4,879.00.

(D) For dry-packing 4,746.9 cubic yards of space above the tunnel, at $3.00 per cubic yard, using the liquid method of measurement, $14,240.70.

(E) For 18,790.7 bags of cement used for grouting, not otherwise paid for, at $3.00 per bag, $56,372.10. *Allen Pope*, 496.

LIV. It is further *held* that the plaintiff is not entitled to recover for "excavation of materials which caved in over the tunnel arch," 4,781 cubic yards at $17 per yard, $81,277.00, since under the contract the plaintiff was not entitled to be paid for the disposition of any materials which fell from outside the "B" or pay line, and the special act creates no new cause of action for such work. *Id.*

LV. The excavations in the tunnel were to be paid for on the basis of measurements in place, according to the lines shown on the drawing or called for by the specifications; and thus the materials which fell in from beyond the "B" line could not have been measured for payment, and were not intended by the contract to be so measured. *Id.*

LVI. In his testimony in the former suit (K–366) the plaintiff indicated that the only way in which he could be compensated, under the contract, for the disposition of this caved-in material was by being paid for dry packing and grouting the space left vacant by the cave-ins, and in his suit he made no claim for any other compensation for such excavated materials. *Id.*

LVII. There is no intimation either in the Special Jurisdictional Act nor in the Committee Reports showing its legislative history that Congress intended to create, for the plaintiff, any new right to recover upon a claim for separate compensation for removal of the caved-in materials, to which the plaintiff in the course of a long

CONTRACTS—Continued.

no appeal, as to temporary heat and supervisory salaries and costs, were reasonable and were not arbitrary and plaintiff is accordingly not entitled to recover for these items of its claim. See *Austin Engineering Co., Inc.* v. *United States*, 97 C. Cls. 68. *Id.*

LXXXI. Where upon final settlement with plaintiff the Comptroller General found that the defaulting prime contractor was indebted to the Government for income tax and interest and deducted the amount of tax and interest from the balance otherwise due to plaintiff under the terms of the original contract; it is *held* that the charging of this tax and interest to plaintiff and the deduction of it from the amount due plaintiff, as surety on the bond for completion of the contract work, were improper, and plaintiff is entitled to recover. *United States Fidelity and Guaranty Co.* v. *United States*, 92 C. Cls. 144. *Id.*

LXXXII. Where the plaintiff, contractor on a Government project in 1938, agreed to plan its work so as to use labor to be obtained from the relief rolls in the manner specified in the contract; and where the plaintiff had the right, under the contract, to insist upon that requirement being modified or waived by the defendant if a sufficient amount of such labor could not be obtained by referrals to satisfy the contract requirements as to the use of relief labor; it is *held* that there was no breach of contract merely because the supply of labor available for referral from the relief rolls was not sufficient to meet the needs of the contractor, and plaintiff is not entitled to recover. See *Frazier-Davis Construction Company* v. *United States*, 100 C. Cls. 120; *Young-Fehlhaber Pile Company* v. *United States*, 90 C. Cls. 4; *Leo Sanders* v. *United States*, 104 C. Cls. 1, distinguished. *Albrecht Company*, 692.

LXXXIII. The defendant did not warrant that any particular amount of relief labor would be available; did not impliedly promise to do more than it did; and its inability to provide by referrals from the relief rolls a larger number of persons than was available was not a breach of the contract. *Id.*

I. The general jurisdiction of the Court of Claims (Section 145 of the Judicial Code) in pay cases is too well known and established to require examination; and where Section 304 of the Urgent Deficiency Appropriation Act, under consideration in the instant case (57 Stat. 431, 450), contains no provision denying the court's jurisdiction, inferences, will not be employed to go to the extent of holding that Congress went so far as to deny the plaintiffs their day in court. *Lovett, Watson and Dodd*, 557.

II. The provision in Section 304 that no available appropriation shall be used to pay the salaries of plaintiffs in the instant does not affect the decision of the Court of Claims, which was "established for the sole purpose of investigating claims against the Government, does not deal with questions of appropriations but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress or the regulations of the executive departments." *Collins* v. *United States*, 15 C. Cls. 22. *Id.*

JUST COMPENSATION.

The plaintiffs are entitled to recover under the constitutional provision that private property shall not be taken without just compensation, whether the taking occurred in time of war or in time of peace. *Causby*, 342.

NATIONAL INDUSTRIAL RECOVERY ACT.

I. Plaintiff, a wholesale and retail dealer, not a manufacturer, entered into a contract with the Government, in 1933, to furnish certain items in the amount and at the time the items might be requested by the Government; plaintiff's bid prices being based on prices quoted to it by manufacturers before their prices were raised as the result of the enactment of the National Industrial Recovery Act. It was *held* that the effect of wage fluctuations was not necessarily reflected precisely in the selling prices, but upon the testimony of a business man familiar with market transactions, it was concluded that the increases in prices were due to the enactment of the National Industrial Recovery Act, and plaintiff is entitled to recover under the provisions of the Act of June 25, 1938. (52 Stat. 1197). *Kaufman*, 244.

II. In the instant case, involving a disputed increase in cost of materials, it is *held* that the burden of proof by a preponderance of evidence has been met by the plaintiff. *Phillips* v. *United States*, 102 C. Cls. 446, distinguished. *Id.*

III. Where the evidence is not sufficient to measure exactly the increased costs due to the enactment of the National Industrial Recovery Act, all the evidence is taken under consideration and a jury verdict is arrived at to give the plaintiff fair and equitable compensation under the Act of June 25, 1938. *Id.*

TAXES—Continued.

INCOME TAX—Continued.

taxable income, and plaintiff is not entitled to recover. *Wiegand*, 111.

VII. (7) The pertinent provisions of section 22, Revenue Act of 1936, applicable to the instant case, have been in effect unchanged under all revenue acts since the adoption of the Sixteenth Amendment, and are in effect at the present time, but the Treasury Regulations interpreting the section, made under the Revenue Act of 1918, and in effect from 1920 until May 2, 1934, were amended as the result of the decision of the court in *Commissioner* v. *Woods*, 57 Fed. (2d) 635; certiorari denied 287 U. S. 613; and the amended regulations have ever since had Congressional acquiescence and approval of Article 22 (a)–16 through continuance of the identical broad provisions of Section 22 (a) in subsequent income tax enactments, and by judicial application of the pertinent Article in cases similar to the instant suit. *Commissioner* v. *Air Reduction Co., Inc.*, 130 Fed. (2d) 145, and other cases cited. *Id.*

VIII. (8) The contentions advanced by plaintiff in the instant case that the regulation in question does not apply because plaintiff was not engaged in dealing in its own stock; that if the gain is taxable the taxable portion must be limited to the difference, if any, between the selling price and the fair market value of the stock on October 19, 1936; and that the amended regulation applied prospectively is invalid because it changes without statutory authority an interpretation of long standing, were considered and rejected in certain of the cases cited. See also *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 99, and *Helvering* v. *Reynolds*, 313 U. S. 428, as to the argument that the Commissioner was not authorized to change the regulation. *Id.*

IX. (9) Where a corporation proposed to rearrange its capital structure so as to permit those who were in active management of its business to retain control of the company through stock ownership; and where the corporation bought its own stock from random stockholders, some of whom sold varying parts of the stock at various prices and some of whom sold none; it is *held* that

TAXES—Continued.

INCOME TAX—Continued.

XVI. (16) A taxpayer is not entitled to accrue a debt or other liability which is asserted against him, but which he disputes and litigates and does not pay, until the litigation is concluded but if a liability is asserted against him and he pays it, though under protest, and though he promptly begins litigation to recover the money, the status of the liability is that it has been discharged by payment. *Security Flour Mills Co. v. Commissioner*, 321 U. S. 281, distinguished. *Id.*

XVII. (17) Where an indenture securing the general mortgage bonds of taxpayer suspended the running of interest on such bonds until September 1, 1938, at which time the taxpayer's serial notes and serial bonds were scheduled to mature; and where the indenture prohibited payment of dividends until all unpaid interest on the general mortgage bonds was paid in full or funds therefor were deposited with the corporate trustee; it was *held* that the taxpayer was entitled to a credit against its undistributed profits in the taxable years in the amount of its earnings which were required to be used to discharge its indebtedness on its serial notes and serial bonds maturing in the two taxable years ending August 31, 1938. *Seaboard Ice Company*, 546.

XVIII. (18) The tax on undistributed profits had for its purpose the improvement of business conditions by putting money into circulation by compelling a corporation to distribute its profits, and, hence, if a corporation could not distribute its profits without violating a written contract it was exempted from the tax to that extent. *Id.*

XIX. (19) The requirement that the prohibitory contract be in writing was for the manifest purpose of avoiding controversy as to whether or not there was such a contract. *Id.*

XX. (20) Where the Commissioner of Internal Revenue on May 8, 1941, as required by the statute, notified taxpayer that its claim for refund for 1936, as to the amount in suit which was collected by offset, had been disallowed and rejected; it is *held* that suit instituted by petition filed in the

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